(1)

Supreme Court, U.S.
FILED

96 902 DEC 5 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CHIAD SAELEE,

Petitioner,

v.

SHIRLEY S. CHATER, Commissioner,
Social Security Administration,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RALPH WILBORN, Attorney at Law
Counsel of Record For Petitioner
RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

115 pp

QUESTIONS PRESENTED

1. Where the claimant in a Supplemental Security Income disability benefits case bears the burden of proof in establishing disability, and where the agency's regulations provide claimants the right to be represented by an attorney, does the ALJ impermissibly deny the claimant due process, the right to counsel, and/or the right to effective assistance of counsel, when he rejects a medical opinion *on the grounds that it was solicited by the claimant's attorney for the purposes of the administrative hearing?*

2. In Supplemental Security Income disability benefits cases, 20 C.F.R. § 416.912(e)(1) requires the adjudicator to " . . . seek additional evidence or clarification from [the claimant's] medical source when the report from [the claimant's] medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques . . . " *Without first complying with the foregoing regulation,* may an administrative law judge reject the disability opinion of a claimant's physician on the grounds that there appears to be no objective medical basis for the opinion or that it contains conflicts or ambiguities?

3. The Social Security Act "contemplates that disability hearings will be **individualized determinations** based on evidence adduced at a hearing." *Heckler v. Campbell,* 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66, 74 (1983).

QUESTIONS PRESENTED – Continued

Where, as here, in finding the claimant not disabled, the administrative law judge relies on racially and/or ethnically biased reports of a one-time consultative examiner and a non-examining medical advisor, does the ALJ deprive the claimant of equal protection and/or the right to an individualized determination because the determination is based on impermissible considerations of race and/or ethnicity?

4. In a Supplemental Security Income disability benefits case where the claimant, who is illiterate in all languages and who speaks only Mien, undergoes a psychiatric examination by an English speaking psychiatrist, does the administrative law judge deny the claimant due process by basing a claim denial on the psychiatrist's report when the psychiatrist conducts the claimant's psychiatric examination using an interpreter who speaks "only Hmong, Laotian, and English, the latter minimally;" and when the interpreter must relay the psychiatrist's questions through the claimant's friend who speaks only "Mien, Laotian, and a "smattering of English?"

5. Can the psychiatric report resulting from the immediately above-detailed examination constitute substantial evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CASES v

STATUTES v

REGULATIONS v

OTHER vi

APPENDIX TABLE OF CONTENTS vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 2

REGULATIONS INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 3

THE CONSULTATIVE PSYCHIATRIC EXAMINATIONS 6

THE HEDBERG REPORT 10

THE ALJ'S DECISION 12

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS 12

REASONS FOR GRANTING THE WRIT: ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

THE NINTH CIRCUIT DECISION CONDONES DENYING DISABILITY CLAIMANTS DUE PROCESS, THE RIGHT TO COUNSEL, AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY PERMITTING ALJS TO REJECT A TREATING PHYSICIAN'S OPINION, IN PART, BECAUSE IT WAS OBTAINED BY THE CLAIMANT'S ATTORNEY FOR PURPOSES OF THE ADMINISTRATIVE HEARING..... 15

THE NINTH CIRCUIT HOLDING RENDERS MEANINGLESS THE AGENCY'S REGULATIONS IMPOSING UPON DISABILITY ADJUDICATORS THE DUTY TO CONTACT AND RECONTACT DISABILITY CLAIMANTS' MEDICAL SOURCES BEFORE REJECTING OPINIONS OF THOSE SOURCES ON THE GROUNDS THAT THE OPINIONS CONTAIN CONFLICTS, ARE AMBIGUOUS, OR ARE NOT SUPPORTED BY OBJECTIVE MEDICAL EVIDENCE 21

THE NINTH CIRCUIT HOLDING AFFIRMS THE ALJ'S DEPRIVING THE CLAIMANT OF EQUAL PROTECTION AND OF AN INDIVIDUALIZED DISABILITY DETERMINATION BY ALLOWING THE ALJ TO BASE THE DETERMINATION ON IMPERMISSIBLE CONSIDERATIONS OF RACE AND/OR ETHNICITY..... 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Bowen v. Yuckert, 107 S.Ct. 2287 (1987) 15, 16

Burkhart v. Bowen, 856 F.2d 1335 (9th Cir. 1988) 18

Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983)..... 27

Miles v. Chater, 84 F.3d 1397 (11th Cir. 1996).....20, 21

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 405(g) 3

42 U.S.C. § 406(a)(1)..... 18

Regulations

20 C.F.R. § 416.912 .....3, 23

20 C.F.R. § 416.912(a)..... 16

20 C.F.R. § 416.912(c)..... 16

20 C.F.R. § 416.912(d)..... 17

20 C.F.R. § 416.912(e)(1) 22, 23

20 C.F.R. § 416.913 .....3, 19

20 C.F.R. § 416.913(b)(6) 17, 18

20 C.F.R. § 416.927 .....3, 23

20 C.F.R. § 416.927(c)(3)..... 23

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. § 416.927(d) 23

20 C.F.R. § 416.928 3

20 C.F.R. § 416.1500 19

20 C.F.R. § 416.1505(a) 19

OTHER

Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (1987) (DSM-III-R) 6, 11, 26

Dorland's Illustrated Medical Dictionary, 26th Edition 4

Supreme Court Rule 13.3 2

Supreme Court Rule 30.1 2

APPENDIX TABLE OF CONTENTS

APPENDIX PAGE

Order And Amended Opinion, U.S. Court of Appeals For The Ninth Circuit, filed August 12, 1996 ..... App. 1

Judgment In A Civil Action, U.S. District Court, filed July 15, 1994 ..... App. 11

Order Adopting Report And Recommendation Re: Plaintiff's Motion For Summary Judgment And/Or Remand And Defendant's Cross-Motion For Summary Judgment, July 14, 1994 ..... App. 12

Report And Recommendation Re: Plaintiff's Motion For Summary Judgment/Remand And Defendant's Cross-Motion For Summary Judgment, March 16, 1994 ..... App. 18

Action of Appeals Council on Request for Review, Dated March 9, 1993 ..... App. 31

Decision of Administrative Law Judge, dated July 27, 1992 ..... App. 34

Order denying Appellant's petition for rehearing and rejecting the suggestion for rehearing en banc, U.S. Court of Appeals For The Ninth Circuit, filed September 6, 1996 ..... App. 58

20 C.F.R. § 416.912 ..... App. 59

20 C.F.R. § 416.913 ..... App. 63

20 C.F.R. § 416.927 ..... App. 67

20 C.F.R. § 416.928 ..... App. 73

APPENDIX TABLE OF CONTENTS – Continued

Letter from Attorney Ishikawa to Dr. Aleman, August 1, 1990 .....App. 75

Letter from Dr. Aleman to Attorney Ishikawa ..App. 76

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chiad Saelee, respectfully petitions this Court to issue a *writ of certiorari* to review the August 12, 1996, Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit affirming the final decision of the Commissioner of the Social Security Administration[1] which denied Petitioner's application for Supplemental Security Income (SSI) disability benefits.

OPINIONS BELOW

Following mesne administrative proceedings, by decision dated July 27, 1992, an administrative law judge (ALJ) found that Petitioner was not disabled and not eligible for SSI disability benefits. (App. 34-57). On March 9, 1993, the Appeals Council of the Social Security Administration declined to review the ALJ's decision. (App. 31-34). This action resulted in the ALJ's decision becoming the agency's final decision.

Petitioner appealed to the U.S. District Court for the Eastern District of California where a magistrate judge

[1] Pursuant to § 106(d) of P.L. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of the Social Security Administration, effective March 31, 1995. Although the Secretary of Health and Human Services was responsible for the actions of the Social Security Administration at the time of the final administrative decision in this case, the undersigned refers to "the Commissioner" throughout this petition for the sake of convenience.

recommended affirming the ALJ's decision in a report and recommendation filed March 16, 1994. (App. 18-30). On July 14, 1994, the Honorable Oliver W. Wanger, U.S. District Judge, adopted the magistrate judge's report and recommendation. (App. 12-17). Judgment in the district court was filed July 15, 1994. (App. 11). Petitioner then appealed to the U.S. Court of Appeals for the Ninth Circuit. By opinion filed May 9, 1996, (reported at 88 F.3d 322) and amended by order and opinion filed August 12, 1996, (reported at 94 F.3d 520) the court of appeals affirmed the ALJ's decision finding Petitioner not disabled. (App. 1-10).

By Order filed September 6, 1996, the U.S. Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing and rejected the suggestion for rehearing *en banc*. (App. 58).

GROUNDS FOR JURISDICTION

The Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit was entered August 12, 1996. (App. 1-10). Petitioner's petition for rehearing was denied by Order filed September 6, 1996. (App. 58). This petition for a *writ of certiorari* is filed within 90 days of the denial of the petition for rehearing and is timely under Supreme Court Rules 13.3 and 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED IN THIS CASE

The following regulations are involved in this case. Because they are voluminous, they are set out in full in the Appendix beginning at the designated pages.

20 C.F.R. § 416.912.....App. 59

20 C.F.R. § 416.913.....App. 63

20 C.F.R. § 416.927.....App. 67

20 C.F.R. § 416.928.....App. 73

STATEMENT OF THE CASE

Because Petitioner (hereinafter, Saelee) seeks review of a judgment of the U.S. Court of Appeals for the Ninth Circuit, she notes that the basis for federal jurisdiction in the court of first instance, the U.S. District Court for the Eastern District of California, was pursuant to 42 U.S.C. § 405(g), following issuance of a final decision by the Commissioner of the Social Security Administration finding Saelee not disabled and not eligible for SSI disability benefits.

Saelee is a Laotian-born Mien. She speaks no English, is illiterate in all languages, and has no formal education. She seeks SSI disability benefits, pursuant to applications filed in April, 1988, and December, 1989, on the basis of combined physical and mental impairments.

Gary Graham, M.D., examined Saelee on 10/26/89, and concluded "the patient has functional blindness in both eyes . . . " On 1/15/90, he reported Dr. Chan also

had completed a neurological workup and concluded that Saelee "had functional blindness."

Dr. Porter examined Saelee on 1/12/90. Her right eye vision was 20/200, but she admitted only light perception in the left eye. Dr. Porter diagnosed astigmatism, myopic, simple, mild, bilateral; pterygium, left; and amblyopia[2], probably due to hysteria or malingering. He concluded that Saelee "is psychologically disturbed and that she is unable to work because of this."

Dr. Aleman began treating Saelee on 1/25/89. His clinical assessments of Saelee's medical problems included insomnia from nightmares, hypertension; severe bilateral hearing loss; chronic dizziness and possible vertigo of middle ear origin; and chronic back pain related to old trauma and degenerative joint disease. In March, 1989, he noted the "language barrier and the patient's tendency to somatisize makes the diagnosis even more difficult." In October, 1989, Dr. Aleman noted his suspicion that Saelee was suffering from a psychosomatic disorder, and in February, 1990, he opined that her symptoms of chest pain, dizziness and shortness of breath seemed to be psychosomatic.

---

[2] *Amblyopia* is "dimness of vision without detectable organic lesion of the eye." *Hysterical amblyopia* is "that which is associated with hysteria." *Hysteria* is a "psychoneurosis, the symptoms of which are based on conversion and which is characterized by lack of control over acts and emotions, by morbid self-consciousness, by anxiety, by exaggeration of the effect of sensory impressions, and by simulation of various disorders." *Dorland's Illust. Med. Dict.* 26th Ed.

In preparation for her administrative hearing, Saelee's attorney asked Dr. Aleman to address "[w]hether Ms. Saelee can perform sedentary work as defined by the Social Security Administration." He enclosed the definition of the term "sedentary" for Dr. Aleman's review, and he asked the doctor to support his opinion with clinical and laboratory evidence. (App. 75-76).

Dr. Aleman responded on 8/9/90 by summarizing the conditions for which he had been treating Saelee, and concluded as follows:

> I do not believe that any of these problems individually would prevent the patient from pursuing a sedentary job, however, her history of lower back pain, leg pain, dizziness, hearing loss, visual difficulties, depression, and anxiety taken as a whole make it very unlikely that she can realistically perform any sedentary job. . . . The prognosis . . . is very poor.

(App. 77-78).

In a follow-up letter to Saelee's attorney on 4/2/92, Dr. Aleman wrote that Saelee's medical conditions remained essentially unchanged from that described in his 8/9/90 letter, and that Saelee's combined impairments "make it very unlikely she can realistically perform any sedentary job at this time."

Saelee received treatment from Merced County Mental Health (MCMH) from 5/21/90 through 2/4/92. Initially, through a Mien interpreter, she reported having had a 7-year depression. The mental health staff assessed

her Global Assessment of Functioning (GAF) at a level of 45, with a high of 55[3] in the past year.

On 9/24/91, she was diagnosed as having a Somatization Disorder and Dependent Personality Disorder, and on 1/31/92, her physicians assessed her current GAF at 21 with a past year high of 31[4].

THE CONSULTATIVE PSYCHIATRIC EXAMINATIONS:

At the agency's request, Saelee underwent 3 consultative psychiatric examinations, the first, on 6/7/88, with David Rodgin, M.D., Ph.D., a diplomate of the American Board of Psychiatry and Neurology. The evaluation was conducted via an interpreter who spoke "passable" but "far from fluent" English. Because of the interpreter's

---

[3] A GAF level of 41 through 50 is defined as:

> **Serious symptoms** (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g., no friends, unable to keep a job). (Emphases in original).

Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (1987) (DSM-III-R at 12).

[4] A GAF level of 21-30 is:

> **Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment** (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) **OR inability to function in almost all areas** (e.g., stays in bed all day; no job, home, or friends). (Emphases in original).

(DSM-III-R at 12).

lack of complete fluency in English, Dr. Rodgin could not conduct a formal mental status examination. He reported his diagnosis and prognosis as follows:

> . . . her psychiatric diagnoses fall into the categoriesy [sic] of depressive disorder not otherwise specified and undifferentiated somatoform disorder. These, of course, are potentiated by severe culture shock.
>
> . . . Prognosis is guarded and it is felt that her symptoms will continue to cause significant problems until consaiderably [sic] more assimilation and familiarization with this culture has taken place. . . . She is not considered capable of managing her own funds.

On August 30, 1988, with the assistance of a Hmong interpreter and Saelee's friend, Wesley Fielding, M.D., conducted Saelee's second psychiatric examination. The Hmong interpreter "spoke only Hmong, Laotian, and English, the latter minimally." **Saelee spoke only Mien.** Saelee's friend spoke Mien, Laotian, and a "smattering of English." In relevant part, Dr. Fielding reported:

> No further historical information could be obtained under the language limitations of this evaluation. . . .

In spite of his inability to conduct a proper psychiatric examination, Dr. Fielding issued a written report replete with racially and/or ethnically biased comments as follows:

> She was dressed in the usual costume of Mien people in Merced, a dirty wide skirt and unmatched print blouse with a filthy colored rag

wrapped around her head. She was an exception, however among members of the Mien tribe, or group, in that she wore glasses. She did not seem to have any trouble seeing objects in the room and did not run into anything in the small office on arriving and on leaving. As far as I could determine she did not really understand why she had come to see me, and she didn't seem to care anyway.

* * *

She never looked directly at me or at anyone else, which seems to be the cultural norm for these races in the women particularly, who are taught to be obsequeous [sic] to the men at all times.

* * *

Hmong and Miens seem to have no negative psychological attitudes towards people who claim disabilities. If someone says they don't feel well enough to work, their statement is never questioned by anyone else. This is not true in this country where every child tries, usually without success, to avoid having to go to school because they are "sick." Here, one must prove that one is not malingering. Not so in Laos.

In the same cultural-difference vein, the word malingering does not carry with it the same stigma in these people that it does in America. To malinger and to claim disabilities seems to be almost a natural maneuver for them, not some dark moral misbehavior it indicates here. It is hard to judge harshly a child who tries to malinger and it is hard to judge a Hmong or a Mien, too, and for the same reason: one cannot

be too hard on someone who does not know any better.

DIAGNOSTIC IMPRESSIONS:

AXIS ONE.....	POSSIBLE MALINGERING POSSIBLE MILD SOMATIFORM [SIC] DISORDER
AXIS TWO.....	POSSIBLE HISTRIONIC PERSONALITY DISORDER
AXIS THREE.....	VAGUE SOMATIC COMPLAINTS, LIKELY WITHOUT PHYSICAL OR LABORATORY VERIFICATION

Dr. Fielding's foregoing report is based not on evidence obtained from his limited psychiatric evaluation of Saelee, but on the doctor's speculation and his racial and ethnic preconceptions. Similarly, his concluding remarks are based not on evidence obtained from his limited psychiatric examination, but on further speculation and racial and ethnic preconceptions. Those remarks follow:

> I found nothing psychiatrically in this individual to label her disabled in any significant way. Like so many Mien and Hmong women she has likely found a good way, without having to lose face, to avoid having to work too hard in her home and to escape the excessive labors of too much work and too many children foisted on the women of her racial group by cultural values. At the same time, her inadequacies likely bolster the image of her husband, who has no way of feeling or acting important to his family in America, in comparison to the usual

> ways he had in Southeast Asia. He gains some respect within his family by taking over his wife's responsibilities.
>
> From the psychiatric viewpoint there is no reason this woman could not be employed, if anyone would hire such a person.

Maximo Parayno, Jr., M.D., performed Saelee's third psychiatric examination on 2/17/90. Assisted by a professional interpreter, Dr. Parayno diagnosed hypochondriasis, astigmatism, myopia, pterygium, hysterical amblyopia[5], and culture shock. He assessed Saelee's current and past year GAF at 50.

THE HEDBERG REPORT:

At Saelee's initial hearing held 10/23/90, she presented testimony through a Mien-English interpreter. No other witnesses testified. Post-hearing, the ALJ sent to Allan Hedberg, Ph.D., 15 interrogatories, seeking his "assistance as a mental health expert with the above-described case." Dr. Hedberg responded in what the ALJ has termed the "Hedberg Report." (See App. 42).

In the Hedberg Report, Dr. Hedberg, a psychologist, has set forth his interpretation of both the medical and the psychological evidence. Moreover, and contrary to the opinions of Saelee's treating and examining physicians, relying largely on Dr. Fielding's racially and/or ethnically biased report, Dr. Hedberg concluded, in effect, that because Saelee is "Southeast Asian, from Laos and Mien," any referenced somatoform disorder cannot be a

---

[5] See footnote 2, *supra*.

disabling psychological disorder because "cultural allowances mitigate any alleged or assumed disabling condition, and also put it on a voluntary basis."

Saelee's attorney requested the right to cross-examine Dr. Hedberg, and a supplemental hearing for this purpose was held on April 7, 1992. Upon cross-examination, *contrary* to the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition, Revised (1987) (DSM-III-R), Dr. Hedberg testified, *inter alia*, that, malingering is "one of the factitious disorders." Dr. Hedberg also admitted that he could not identify reference sources which suggested that it was acceptable within the **Mien** culture for one to make physical complaints as described by Dr. Fielding. He stated:

> I'll call it a sub culture within the Southeast Asian. However, it is referred to as a pattern that is not uncommon within the Southeast Asian. . . . It's not a dominant feature, but it's an allowable feature within the culture and it does occur with some degree of regularity . . .

Dr. Hedberg admitted, that in formulating his opinions, he gave no weight to the opinions of Saelee's ophthalmologists that Saelee's functional blindness and inability to work was based on a psychological disturbance. He also admitted that, in reaching his conclusions, he gave no greater weight to the opinions of treating physicians over those of consultative examiners.

THE ALJ'S DECISION:

In finding Saelee not disabled, the ALJ relied on the Hedberg Report and Dr. Hedberg's testimony. Specifically, the ALJ adopted Dr. Hedberg's opinion that "the claimant only suffers from mild depression which is complicated by her cultural background." (App. 49).

The ALJ rejected treating physician Aleman's opinion as follows:

> I find specific, legitimate reasons for disregarding this opinion. It was given for the purpose of this proceeding and differs significantly from the doctor's treatment notes as well as being contradicted by other medical findings and opinions in the record. The opinion is worded in such a way that it strikes me as an effort by the physician to assist a patient even though there is no objective medical basis for the opinion. Perhaps most important is the concession by Dr. Aleman that he was unable to establish any organic basis for most of her complaints and was relying on her subjective allegations. As discussed later, I find those allegations to be entirely untrustworthy.

(App. 41).

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS:

Addressing Saelee's allegation that the physicians' opinions on which the ALJ relied were biased because they attributed her ailments in part to her culture, the Ninth Circuit held:

> . . . As a Mien, two consulting physicians concluded, Saelee suffered from a tendency to malinger which they suggested was common among people of her southeast Asian cultural descent.
>
> While this analysis implicates concerns of ethnic stereotyping, the decision of the ALJ was not based on that, but rather upon the lack of any connection between Saelee's complaints and some organic medical condition. To the extent the ALJ discussed Saelee's supposed cultural tendencies, it was offered only as a possible explanation for the otherwise inexplicable causes of her complaints.

(App. 8).

Affirming the propriety of the ALJ's rejecting Dr. Aleman's disability opinion, in part, because it was obtained by Saelee's attorney, the Ninth Circuit stated:

> . . . the ALJ had discretion to disregard Dr. Aleman's diagnosis. *Andrews*, 53 F.3d at 1041. Exercising that discretion, the ALJ found Dr. Aleman's report untrustworthy because it was obtained solely for purposes of the administrative hearing, varied from Dr. Aleman's own treatment notes, and was worded ambiguously in an apparent attempt to assist Saelee in obtaining social security benefits.

(App. 9).

The Ninth Circuit then held that the ALJ's rejection of Dr. Aleman's report on the grounds that it was solicited by Saelee's attorney was a permissible credibility determination. (App. 9-10).

REASONS FOR GRANTING THE WRIT: ARGUMENT

This case presents a conflict between the Ninth and Eleventh Circuits on an important federal question. There are compelling reasons for this Court to grant the petition for a *writ of certiorari* to resolve that conflict. Moreover, this case involves a decision of the U.S. Court of Appeals for the Ninth Circuit which has decided important questions of federal law which have not been, but for which there are compelling reasons that they should be, settled by this Court.

Because the Supplemental Security Income disability program is a needs based federal program, national in scope, there is a compelling need for consistent, uniform, and fair application of the agency's implementing regulations.

Where, as here, a disability claimant's race and/or ethnic identity is used to justify a finding of no disability, the claimant is denied the right to an individualized determination guaranteed by the Social Security Act and recognized in this Court's precedent.

Where, as here, the disability claimant bears the burden of proof and is given a regulatory right to be represented by an attorney, that right is rendered meaningless if the agency, via a "credibility determination," can discount a medical opinion on the grounds that it was obtained by the claimant's attorney for purposes of the administrative hearing. Such a rule results in the *de facto* denial of the right to counsel and the effective assistance of counsel. The Ninth Circuit's decision implicates compelling federal questions of due process, equal protection, and the right to counsel.

THE NINTH CIRCUIT DECISION CONDONES DENYING DISABILITY CLAIMANTS DUE PROCESS, THE RIGHT TO COUNSEL, AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY PERMITTING ALJs TO REJECT A TREATING PHYSICIAN'S OPINION, IN PART, BECAUSE IT WAS OBTAINED BY THE CLAIMANT'S ATTORNEY FOR PURPOSES OF THE ADMINISTRATIVE HEARING

In a Social Security disability case, **the claimant** bears the burden of proving disability. The Supreme Court recognized this burden in *Bowen v. Yuckert*, 107 S.Ct. 2287 (1987), as follows:

> The Secretary, moreover, has express statutory authority to place the burden of showing a medically determinable impairment on the claimant. The Act provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." § 423(d)(5)(A) (1982 ed. and Supp. III). See *Mathews v. Eldridge*, 424 U.S. 319, 336, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Moreover, this Court acknowledged a settled allocation of burdens of proof in disability proceedings as follows:

> . . . The claimant first must bear the burden at step one of showing that he is not working, at step two that he has a medically severe impairment or combination of impairments, and at step four that the impairment prevents him from performing his past work. If the process ends at step two, the burden of proof never shifts to the Secretary. Similarly, if the impairment is one that is conclusively presumed to be disabling, the claimant is not required to bear the burden of showing that he is unable to perform his prior

> work. See *Bluvband v. Heckler*, 730 F.2d 886, 891 (CA2 1984). This allocation of burdens of proof is well within the Secretary's "exceptionally broad authority" under the statute. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2639, 69 L.Ed.2d 460 (1981). It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so.

Bowen v. Yuckert, 107 S.Ct. at 2311 n.5.

In conformity with the foregoing, 20 C.F.R. § 416.912(a) explains **to claimants** their burden of proof, in relevant part, as follows:

> *General.* In general, you have to prove to us that you are blind or disabled. Therefore, you must bring to our attention everything that shows that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are blind or disabled, its effect on your ability to work on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.

(App. 59).

Further, 20 C.F.R. § 416.912(c) explains **to claimants** their responsibility for providing evidence, in relevant part, as follows:

> *Your responsibility.* You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled. . . .

(App. 60)

On the other hand, 20 C.F.R. § 416.912(d) explains the agency's responsibilities. It provides, in relevant part:

> *Our responsibility.* Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports.

(App. 61).

Moreover, in addressing the contents of requested medical reports, 20 C.F.R. § 416.913(b)(6) provides that medical reports should include:

> A statement about what you can still do, despite your impairment(s) based on the medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of this section (except in statutory blindness claims). Although **we will request a medical source statement about what you can still do despite your impairment(s)**, the lack of the medical source statement will not make the report incomplete. See § 416.927.

(Bold emphasis added) (App. 64).

In the instant case, as the hearing approached, medical reports from Saelee's treating physician, Dr. Aleman, did not contain a **"medical source statement about what**

[Saelee] can still do despite [her] impairment(s)". Contrary to his regulatory duty set out in 20 C.F.R. § 416.913(b)(6), the ALJ had not requested such a statement. As the foregoing discussion establishes, Saelee had both a right, and the duty, to solicit a medical source statement to corroborate her claim for benefits. Accordingly, Saelee's attorney requested the statement. (See App. 75-76). In his decision, the ALJ rejected Dr. Aleman's statement, in part, because "[i]t was given for the purpose of this proceeding . . . " (App. 41).

The Ninth Circuit affirmed, holding that the ALJ's rejection of the doctor's opinion letter on the grounds that it had been solicited by the claimant's counsel was a permissible credibility determination. Citing *Burkhart v. Bowen*, 856 F.2d 1335, 1339 (9th Cir. 1988), the Ninth Circuit stated:

> . . . we [ ] have permitted an ALJ to question a doctor's credibility because, as here, the doctor's opinion letter had been solicited by the claimant's counsel.

(App. 9-10).

Saelee contends that the Ninth Circuit's holding affirms the ALJ's denying her due process, the right to counsel and the right to effective assistance of counsel. The Supreme Court has not recognized a constitutional right to counsel at a Social Security disability hearing. Moreover, while the Social Security Act (42 U.S.C. § 406(a)(1)) gives to *certain attorneys in good standing* a statutory right to represent claimants before the agency, the Act, itself, does not guarantee to claimants the right to counsel at a disability hearing.

Although claimants may not have a constitutional or statutory right to counsel at Social Security disability hearings, **by regulation**, the Social Security Administration guarantees claimants the right to be represented by certain attorneys in good standing. 20 C.F.R. §§ 416.1500 & 416.1505(a).

Here, Saelee exercised her regulatory right to be represented by an attorney in good standing, Mr. Ishikawa. Undertaking his ethical responsibilities competently to represent his client's interests, when the ALJ had failed to discharge his own regulatory duty to request a medical source statement from Dr. Aleman, Attorney Ishikawa sought and obtained it, only to have it rejected in part, because "[i]t was given for the purpose of this proceeding . . . "

Although the agency guarantees a claimant the right to be represented by an attorney, that right is rendered meaningless *ab initio* when, as here, the product of that representation can be nullified on the grounds that the attorney procured it for purposes of the claimant's administrative hearing.

Because the claimant bears the burden of proving disability, the claimant has both a right, and the duty, to solicit a medical opinion to corroborate her claim for benefits. 20 C.F.R. § 416.913. The purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them. An examining or treating doctor's findings and opinions are entitled to no less weight when they are procured by the claimant's attorney than when they are obtained by the Commissioner. In the

absence of affirmative evidence of the fact, the Commissioner may not assume that doctors routinely lie in order to help their patients collect disability benefits. The Ninth Circuit is alone among the courts of appeal in condoning such an overt violation of the Social Security Act, the Act's implementing regulations, and due process.

The Eleventh Circuit was faced with a similar situation in *Miles v. Chater*, 84 F.3d 1397 (11th Cir. 1996), where, in a decision issued after the hearing, the ALJ rejected the opinion of the claimant's physician, Dr. McLain, in a "credibility determination," which included an observation that "Dr. McLain's examinations for Mr. McCluskey **[Miles' attorney]** almost invariably conclude that the person being examined is totally disabled." In reversing and remanding for a new hearing, the Eleventh Circuit reasoned as follows:

> The ALJ plays a crucial role in the disability review process. Not only is he duty-bound to develop a full and fair record, he must carefully weigh the evidence, giving individualized consideration to each claim that comes before him. Because of the deferential standard of review applied to his decision-making, the ALJ's resolution will usually be the final word on a claimant's entitlement to benefits. The impartiality of the ALJ is thus integral to the integrity of the system. *See Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423, 427 (1971) (citations omitted) ("Trial before 'an unbiased judge' is essential to due process.").
>
> The ALJ's observations here with respect to the medical opinions rendered by McLain for McCluskey's clients, without any evidence in support thereof, reflect that the process was

> compromised in this case. [Footnote omitted]. We therefore hold that Miles is entitled to an unbiased reconsideration of her application for benefits before a different ALJ . . .

84 F.3d at 1401.

In the instant case, the Ninth Circuit's decision unfairly singles out SSI disability applicants within its states to receive disparate treatment in the evaluation of their claims when those claims are supported by medical source statements obtained by claimants' attorneys. In light of the apparent conflict in the circuits over this issue, but just as importantly, given the national scope of the Social Security Act and its implementing regulations, and given the compelling need for consistent, uniform, and fair application thereof, there is a compelling need for this court to review the Ninth Circuit's decision.

THE NINTH CIRCUIT HOLDING RENDERS MEANINGLESS THE AGENCY'S REGULATIONS IMPOSING UPON DISABILITY ADJUDICATORS THE DUTY TO CONTACT AND RECONTACT DISABILITY CLAIMANTS' MEDICAL SOURCES BEFORE REJECTING OPINIONS OF THOSE SOURCES ON THE GROUNDS THAT THE OPINIONS CONTAIN CONFLICTS, ARE AMBIGUOUS, OR ARE NOT SUPPORTED BY OBJECTIVE MEDICAL EVIDENCE.

Here, the ALJ also rejected Dr. Aleman's report because it purportedly varied from the doctor's treatment notes, was contradicted by other findings and opinions, and because the "opinion is worded in such a way that it strikes me as an effort by the physician to assist a patient even though there is no objective medical basis for the

opinion." (App. 41). The Ninth Circuit affirmed the ALJ's actions on the grounds that the report –

> . . . varied from Dr. Aleman's own treatment notes, and was worded ambiguously in an apparent attempt to assist Saelee in obtaining social security benefits.

(App. 9).

In Supplemental Security Income disability benefits cases, 20 C.F.R. § 416.912(e)(1) requires adjudicators to –

> . . . seek additional evidence or clarification from [the claimant's] medical source when the report from [the claimant's] medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques . . . "

(App. 62).

In the instant case, in light of the ALJ's concerns that Dr. Aleman's report contained a conflict or ambiguity that must be resolved or that it did not appear to be based on medically acceptable clinical and laboratory diagnostic techniques, the ALJ was required to recontact Dr. Aleman to seek additional evidence or clarification. Instead, the ALJ ignored 20 C.F.R. § 416.912(e)(1) and solicited a post-hearing report, upon which to base his decision, from a non-examining, non-treating psychologist, Dr. Hedberg.

Saelee's attorney then requested that Dr. Hedberg be subpoenaed for cross-examination. Under cross-examination, Dr. Hedberg conceded that, in reaching his conclusions, he

was speculating about various opinions in the record. He also conceded he was according no special weight to opinions based on treating as opposed to examining and non-examining relationships, and his testimony established that there were unresolved ambiguities and conflicts in the record. With express knowledge of such ambiguities and conflicts, however, again the ALJ ignored 20 C.F.R. § 416.912(e)(1) and simply rejected Dr. Aleman's report, relying solely on Dr. Hedberg's interpretation of the record.

Not only does the ALJ's action contravene 20 C.F.R. § 416.912(e)(1), but it also contravenes the agency's regulations which govern how the agency will evaluate medical opinions about a claimant's impairments or disability. (*See* 20 C.F.R. § 416.927 set out in full at App. 67-73). The ALJ's action contravenes § 416.927(c)(3) which recognizes the adjudicator's obligation to recontact medical sources under the provisions of § 416.912. Additionally, the ALJ's action contravenes § 416.927(d) which requires that, after full development of the claimant's medical history, medical opinions be weighed based on such enumerated criteria as whether the medical source is a treating, examining, or non-examining source; the nature and extent of the treatment relationship; the length of the treatment relationship and the frequency of examination; consistency; and specialization.

The Ninth Circuit's affirming the ALJ's rejection of Dr. Aleman's report, without requiring the ALJ to recontact Saelee's medical sources to resolve the ambiguities and conflicts and then to weigh the medical opinions pursuant to the express regulatory criteria, permits the ALJ to ignore both the ambiguities and conflicts in the

record, to weigh the medical opinions by improper criteria, and to base his decision solely upon the interpretation of the record by a non-examining medical advisor, effectively rendering the agency's regulations superfluous and of no force and effect.

THE NINTH CIRCUIT HOLDING AFFIRMS THE ALJ'S DEPRIVING THE CLAIMANT OF EQUAL PROTECTION AND OF AN INDIVIDUALIZED DISABILITY DETERMINATION BY ALLOWING THE ALJ TO BASE THE DETERMINATION ON IMPERMISSIBLE CONSIDERATIONS OF RACE AND/OR ETHNICITY

As set out above, the Ninth Circuit recognized that Dr. Fielding and Dr. Hedberg concluded that "[a]s a Mien, . . . Saelee suffered from a tendency to malinger which they suggested was common among people of her southeast Asian cultural descent." (App. 8). The Ninth Circuit then held –

> While this analysis implicates concerns of ethnic stereotyping, the decision of the ALJ was not based on that, but rather upon the lack of any connection between Saelee's complaints and some organic medical condition. To the extent the ALJ discussed Saelee's supposed cultural tendencies, it was offered only as a possible explanation for the otherwise inexplicable causes of her complaints.

(App. 8).

The Ninth Circuit's opinion notwithstanding, the ALJ's analysis did implicate concerns of ethnic stereotyping and the ALJ did base his decision on that. The Ninth Circuit expressly held that the "ALJ's primary reliance on the findings of Dr. Hedberg, a medical consultant, was

not an abuse of discretion." (App. 8). As set out above, Dr. Hedberg relied largely on the ethnically biased report of Dr. Fielding and upon his own ethnic bias in writing his report and in testifying upon cross-examination.

Dr. Fielding's report was tainted not only by his ethnic bias but by his use of a three-way relay of unqualified interpreters to conduct his psychiatric examination. A report resulting from such an examination should be held not capable of being substantial evidence. Moreover, Dr. Hedberg's adoption of that report must be viewed as equally tainted and as equally insubstantial.

Although admitting he could not identify reference sources which suggested it was acceptable within the Mien culture to malinger symptoms, Dr. Hedberg nevertheless insisted there was what he called "a subculture within the Southeast Asian." He stated that malingering symptoms was "referred to as a pattern that is not uncommon within the Southeast Asian. . . . it's an allowable feature within the culture and it does occur with some degree of regularity . . . "

From that background knowledge, without any evidence that Saelee was a member of the referenced "sub culture," Dr. Hedberg concluded Saelee could not have a disabling somatoform disorder because she is a member of the Southeast Asian culture. In other words, Dr. Hedberg concluded that if Saelee were not Southeast Asian, she could have a disabling somatoform disorder (as several of her physicians opined she did). However, according to Dr. Hedberg, because Saelee is Southeast Asian, her allegations of physical symptoms – not resulting from

organic pathology – must be malingered, and, therefore, cannot be disabling.

The American Psychiatric Association's *Diagnostic And Statistical Manual III,* (Third Edition-Revised) (DSM III-R), page 255, describes somatoform disorders, in relevant part, as follows:

> The essential features of this group of disorders are physical symptoms suggesting physical disorder (hence, Somatoform) for which there are no demonstrable organic findings or known physiologic mechanisms, and for which there is positive evidence, or a strong presumption, that the symptoms are linked to psychological factors or conflicts. Unlike in Factitious Disorder or Malingering, the symptom production in Somatoform Disorders is not intentional, i.e., the person does not experience the sense of controlling the production of the symptoms. Although the symptoms of Somatoform Disorders are "physical," the specific pathophysiologic processes involved are not demonstrable or understandable by existing laboratory procedures and are conceptualized most clearly by means of psychological constructs. For that reason, these are classified as mental disorders.

As the DSM III-R establishes, it is the very nature of somatoform disorders that, for individuals with such disorders, there are no demonstrable organic findings or medical conditions underlying the individual's somatic complaints. Accordingly, the Ninth Circuit disingenuously holds the ALJ's discussion of Saelee's ethnicity "was offered only as a possible explanation for the otherwise inexplicable causes of her complaints." In the factual circumstances of this case, the court and the ALJ ignored

that the "otherwise inexplicable cause[ ] of [Saelee's] complaints," is that, in spite of being Southeast Asian, she has a disabling somatoform disorder as diagnosed by several treating and examining physicians. Where, as here, the ALJ finds Saelee does not have a somatoform disorder because she is Southeast Asian, the ALJ's decision is based on impermissible considerations of race and ethnicity and deprives Saelee of the right to an individualized determination.

This Court has recognized that the Social Security Act "contemplates that disability hearings will be **individualized determinations** based on evidence adduced at a hearing." *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66, 74 (1983). Where, as here, in finding the claimant not disabled, the ALJ relies on racially and/or ethnically biased reports of a one-time consultative examiner and a non-examining medical advisor to find that a claimant does not have a disabling somatoform disorder, the ALJ deprives the claimant of equal protection and the right to an individualized determination because the determination is based on impermissible considerations of race and/or ethnicity.

CONCLUSION

For the foregoing reasons, Saelee respectfully prays that this Court issue a *writ of certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RALPH WILBORN, Attorney at Law
Counsel Of Record For Petitioner
RALPH WILBORN & ETTA L. WILBORN, P.C.
1580 Valley River Drive, Suite 170
Eugene, Oregon 97401
(541) 485-4265

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHIAD SAELEE, *Plaintiff-Appellant,* v. SHIRLEY S. CHATER, Commissioner of the Social Security Administration,* *Defendant-Appellee.*	No. 94-16664 D.C. No. CV-93-5220 OWW (DLB) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Submitted December 7, 1995**
San Francisco, California

Filed May 9, 1996

*In accordance with section 106(d) of the Social Security Independence and Program Improvements Act of 1994, P.L. No. 103-296, Shirley S. Chater, the Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as defendant-appellee. Because the Secretary of Health and Human Services was responsible for actions of the Social Security Administration during the earlier proceedings reviewed here, we will refer to the defendant-appellee as "Secretary" rather than "Commissioner" for convenience.

**The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Amended August 12, 1996

Before: J. Clifford Wallace and David R. Thompson, Circuit Judges, and John W. Sedwick, District Judge.***

Per Curiam

SUMMARY

Government Law/Social Security

The court of appeals affirmed a decision of the Commissioner of Social Security. The court held that a consulting physician's attribution of a malingering tendency to the cultural background of an applicant for social security benefits is insufficient to negate a finding of no disability that is based on a lack of an organic basis for the claimant's physical complaints.

Appellant Chiad Saelee applied for supplementary income disability benefits under the Social Security Act. Saelee complained of physical and psychological ailments. Except for a hearing impairment, consulting medical examinations did not reveal an underlying medical cause for Saelee's complaints. This was corroborated by the opinions of examining and consulting physicians that were based on independent clinical findings. In one instance Saelee was able to move about in a doctor's office although she claimed to be blind; in another she walked steadily into a doctor's examination room and limped out. Two consulting physicians concluded that

---

***Hon. John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

Saelee had a tendency to malinger that was associated with her southeast Asian cultural background.

Dr. Aleman, Saelee's treating physician, reached conclusions contrary to those of the other doctors in a report that was worded ambiguously and had been prepared solely to help Saelee obtain social security benefits.

An administrative law judge (ALJ) determined that Saelee's psychological ailments were non-severe and that her hearing impairment was treatable. However, the ALJ concluded that no physician linked Saelee's ailments to known medical pathologies and that her complaints were extremely vague. The ALJ found Dr. Aleman's report untrustworthy. Relying primarily on Dr. Hedberg's findings, the ALJ concluded that Saelee was not disabled and therefore not entitled to benefits.

Relying on the recommendation of a magistrate judge, the district court found that the ALJ's findings were supported by substantial evidence.

On appeal, Saelee contended that the physicians' opinions on which the ALJ relied were biased against her because of her southeast Asian cultural descent, and that the ALJ should not have disregarded Dr. Aleman's opinion.

The decision of the ALJ was not based on ethnic stereotyping, but on the lack of any connection between Saelee's complaints and some organic condition. The findings of a nontreating consulting physician can amount to substantial evidence, so long as other evidence supports them.

Dr. Hedberg's opinion was corroborated by the opinions of other examining and consulting physicians, which were based on independent clinical findings. Because Dr. Hedberg and the other examining physicians' opinions were based on independent clinical findings, the ALJ had discretion to disregard Dr. Aleman's diagnosis. The ALJ's conclusion that Dr. Aleman's solicited report was untrustworthy was a permissible credibility determination.

COUNSEL

Robert Ishikawa, Bromberg & Ishikawa, Fresno, California, for the appellant.

Donna Wade Anderson, Assistant Regional Counsel, Department of Health and Human Services, San Francisco, California, for the appellee.

ORDER

The opinion filed May 9, 1996, and published at 83 F.3d 322 (9th Cir. 1996) is amended as follows:

At slip op. 5676-77, the last sentence of the last paragraph of the text, which sentence begins "In these circumstances," is deleted, and the following additional two paragraphs are inserted as the last paragraphs of the text of the opinion:

> We have consistently held that "questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary." *Allen v. Heckler*, 749 F.2d 577, 580 n.1 (9th Cir. 1985) (quotations omitted). "The ALJ is responsible for determining credibility and resolving

conflicts in medical testimony." *Magallanes*, 881 F.2d at 750. Although in *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1996), we stated that "[t]he purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them," *id.* at 832, we also have permitted an ALJ to question a doctor's credibility because, as here, the doctor's opinion letter had been solicited by the claimant's counsel. *See Burkhart v. Bowen*, 856 F.2d 1335 (9th Cir. 1988). In *Burkhart*, we explained that the ALJ's comment was "a permissible credibility determination given the evidence before the ALJ." *Id.* at 1339. Because *Lester* could not have superseded our law established in *Allen* and *Burkhart*, *see United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995) ("only a panel sitting en banc may overturn existing Ninth Circuit precedent"), we assume *Lester* is limited to the particular circumstances presented therein.

As in *Burkhart*, here the ALJ's conclusion that Dr. Aleman's solicited report was untrustworthy was a permissible credibility determination. The ALJ stated that Dr. Aleman's opinion "is worded in such a way that it strikes [him] as an effort by the physician to assist a patient even though there is no objective medical basis for the opinion." The ALJ pointed out that Dr. Aleman himself stated that he was unable to establish any organic basis for most of Saelee's complaints and that he relied on her subjective allegations, which the ALJ, in his discretion, disregarded as "entirely untrustworthy." Thus, the ALJ cited to evidence of "actual improprieties" in Dr. Aleman's report. *See Lester*, 81 F.3d at 832. In these circumstances, the ALJ did not

abuse his discretion in rejecting Dr. Aleman's opinion.

AFFIRMED.

OPINION

PER CURIAM.

Chiad Saelee appeals the district court's summary judgment in favor of the Commissioner of the Social Security Administration (Commissioner) in her action challenging the Commissioner's denial of supplemental income disability benefits under the Social Security Act (the Act), 42 U.S.C. § 405(g). The administrative law judge (ALJ) found that Saelee was not disabled within the meaning of the Act, and the district court, relying on the recommendation of the magistrate judge, found that the ALJ's findings were supported by substantial evidence and granted summary judgment to the Commissioner. Saelee appeals and we affirm.

DISCUSSION

Saelee raises two issues on appeal. She contends the ALJ's finding that she was not disabled within the meaning of the Act was not supported by substantial evidence. Saelee also contends the ALJ erred in rejecting the findings and opinions of her treating physician in favor of the findings and opinions of nontreating consultants.

The standard of review of a district court's grant of summary judgment is de novo. *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). Summary judgment is appropriate if there are no disputed issues of material fact and

the moving party is entitled to judgment as a matter of law. *Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). When reviewing factual determinations by the Commissioner, acting through the ALJ, regarding an individual's disability, we affirm if "substantial evidence" supports the determinations. 42 U.S.C. § 405(g); *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). Substantial evidence is "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (internal quotations omitted), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

There is ample evidence in the record to support the ALJ's determination that Saelee is not disabled. Saelee complains of numerous physical and psychological ailments that prevent her from engaging in any substantial work. With regard to Saelee's psychological impairments, the evidence showed that Saelee suffered from mild depression and possibly factitious disorder. The ALJ correctly determined that these psychological ailments were "nonsevere."

With regard to Saelee's physical condition, except for her hearing impairment, numerous medical examinations failed to disclose any underlying medical cause of the ailments of which Saelee complained. With regard to Saelee's hearing impairment, the ALJ found her to be hearing impaired in one ear, but capable of normal hearing with the assistance of a hearing aid.

The ALJ's decision discusses each of Saelee's alleged ailments in detail and correctly concludes that no physician has been able to find a link between Saelee's complaints and known medical pathologies. Lacking any

organic basis, Saelee's complaints were deemed "extremely vague" by the ALJ.

Saelee's conduct also raised doubts about the integrity of her complaints; in one instance, she was able to move about a doctor's office at ease despite claiming to be blind and, in another, she left a doctor's examination room limping heavily although she had no noticeable limp when she entered the room.

Saelee argues that the physicians' opinions on which the ALJ relied were biased because they attributed her ailments in part to her culture. As a Mien, two consulting physicians concluded, Saelee suffered from a tendency to malinger which they suggested was common among people of her southeast Asian cultural descent.

While this analysis implicates concerns of ethnic stereotyping, the decision of the ALJ was not based on that, but rather upon the lack of any connection between Saelee's complaints and some organic medical condition. To the extent the ALJ discussed Saelee's supposed cultural tendencies, it was offered only as a possible explanation for the otherwise inexplicable causes of her complaints.

The ALJ's primary reliance on the findings of Dr. Hedberg, a medical consultant, was not an abuse of discretion. We have held that the findings of a nontreating, nonexamining physician can amount to substantial evidence, so long as other evidence in the record supports those findings. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 752 (9th Cir. 1989). Dr. Hedberg's opinion was corroborated by the opinions of other examining and consulting physicians,

which in turn were based on independent clinical findings. The essence of these opinions was that Saelee suffered from no demonstrable physical condition, which controverted the testimony of Dr. Aleman, Saelee's treating physician.

Because Dr. Hedberg and the other examining physicians' opinions were based on "independent clinical findings," the ALJ had discretion to disregard Dr. Aleman's diagnosis. *Andrews*, 53 F.3d at 1041. Exercising that discretion, the ALJ found Dr. Aleman's report untrustworthy because it was obtained solely for the purposes of the administrative hearing, varied from Dr. Aleman's own treatment notes, and was worded ambiguously in an apparent attempt to assist Saelee in obtaining social security benefits.

We have consistently held that "questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary." *Allen v. Heckler*, 749 F.2d 577, 580 n.1 (9th Cir. 1985) (quotations omitted). "The ALJ is responsible for determining credibility and resolving conflicts in medical testimony." *Magallanes*, 881 F.2d at 750. Although in *Lester v. Chater*, 81 F.3d 821 (9th Cir. 1996), we stated that "[t]he purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them," *id.* at 832, we also have permitted an ALJ to question a doctor's credibility because, as here, the doctor's opinion letter had been solicited by the claimant's counsel. *See Burkhart v. Bowen*, 856 F.2d 1335 (9th Cir. 1988). In *Burkhart*, we explained that the ALJ's comment was "a permissible credibility determination given the evidence before the ALJ." *Id.* at 1339. Because *Lester* could not have superseded our law established in *Allen*

and *Burkhart, see United States v. Camper,* 66 F.3d 229, 232 (9th Cir. 1995) ("only a panel sitting en banc may overturn existing Ninth Circuit precedent"), we assume *Lester* is limited to the particular circumstances presented therein.

As in *Burkhart,* here the ALJ's conclusion that Dr. Aleman's solicited report was untrustworthy was a permissible credibility determination. The ALJ stated that Dr. Aleman's opinion "is worded in such a way that it strikes [him] as an effort by the physician to assist a patient even though there is no objective medical basis for the opinion." The ALJ pointed out that Dr. Aleman himself stated that he was unable to establish any organic basis for most of Saelee's complaints and that he relied on her subjective allegations, which the ALJ, in his discretion, disregarded as "entirely untrustworthy." Thus, the ALJ cited to evidence of "actual improprieties" in Dr. Aleman's report. *See Lester,* 81 F.3d at 832. In these circumstances, the ALJ did not abuse his discretion in rejecting Dr. Aleman's opinion.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHIAD SAELEE,
(S.S. #566-91-7485),

Plaintiff,

vs.

SECRETARY OF HEALTH
AND
HUMAN SERVICES,

Defendant.

_____/

JUDGMENT IN A CIVIL ACTION

CV-F-92-5220
OWW/DLB

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Magistrate's Report and Recommendation is ADOPTED; plaintiff's motion for summary judgment and/or remand is DENIED; defendant's motion for summary judgment is GRANTED.

Date: July 15, 1994

JACK L. WAGNER, Clerk

/s/ By S Dilley
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHIAD SAELEE, (S.S. # 566-91-7485, Plaintiff, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	CV-F-93-5220 OWW DLB ORDER ADOPTING REPORT AND RECOMMENDATION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND/OR REMAND AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This case comes before the Court on plaintiff's motion for summary judgment and/or remand and defendant's cross-motion for summary judgment. The Magistrate Judge filed a report and recommendation on March 17, 1994. Plaintiff has filed objections. The Court has reviewed the report and recommendation of the Magistrate and the underlying file pursuant to the provisions of 28 U.S.C. § 636(b) (1). Under that standard, a *de novo* review is conducted for those portions of the Magistrate's report to which a litigant has filed an objection. 28 U.S.C. § 636(b) (1) (C); Fed.R.Civ.P. 72(a).

Plaintiff argues that the Magistrate relied solely on the testimony of Dr. Hedberg, an impartial medical consultant who had never examined plaintiff, in finding that the ALJ's decision was based on substantial evidence.

"A report of a non-examining, non-treating physician should be discounted and is not substantial evidence when contradicted by all other evidence in the record." *Gallant v. Heckler,* 753 F.2d 1450, 1454 (9th Cir. 1984). But reliance on a consultant is appropriate if the consultant's testimony is not contradicted by all other evidence in the record, and the ALJ's determination rests in part on other evidence. *Magallanes v. Bowen,* 881 F.2d 747 (9th Cir. 1989). Here, the ALJ did not rely solely on the testimony and report of Dr. Hedberg, but found plaintiff did not qualify for benefits because the record as a whole lacked evidence that plaintiff's impairment was severe or that she was incapable of work. The ALJ pointed out that other physicians had found plaintiff's complaints of left leg pain, back pain, severe depression and severe vision impairment were without medical basis, including a treating physician who conceded he was unable to establish any organic basis for most of plaintiff's complaints. The ALJ may properly rely on Dr. Hedberg's assessment to the extent it is consistent with other independent evidence in the record. *Magallanes,* 881 F.2d at 752. The Magistrate also relied on Dr. Hedberg's report, which was based on a review of all doctor's reports and their underlying, independent clinical findings. A non-treating physician's opinion, if based on objective medical tests, can constitute substantial evidence. *Miller v. Heckler,* 770 F.2d 845, 849 (9th Cir. 1985). Plaintiff's objection that the Magistrate improperly found the opinion of Dr. Hedberg constituted substantial evidence is over-ruled.

Plaintiff argues that Dr. Hedberg's criticism of consultive psychiatrist Dr. Maximo Parayno's findings are baseless, because Dr. Hedberg lacked familiarity with Dr.

Parayno's methodology. Dr. Parayno assessed plaintiff's global functioning ("GAF") at 50, stating:

> We have a 39 y/o woman who complains of multiple physical symptoms. After a physical workup, apparently there is nothing organic that would explain the physical symptoms. There apparently has been no history of any serious medical problems such as injury or infection. The patient continues to complain of sensory deficits, particularly to her vision. It would seem that the patient is having a sonamoform [sic] disorder, particularly hypochondriasis. Her activities of daily living are restricted and this would be consistent within the culture in which the identified patient assumes a complete dependency status and her needs are met by the apparently well off members of her family.

AR, Exhibit 38. Dr. Hedberg stated a GAF 50 was inconsistent with the remainder of the report, explaining, "I think [Dr. Parayno]'s saying that because of her preference to assume a sick role and to be dependent upon her family she functions at a low level and he described it as a 50." AR 123. Plaintiff argues when Dr. Parayno assessed a GAF 50, "there should have been no doubt, in the absence of contrary evidence, that he was correctly using the GAF scale to indicate 'serious' impairments related to mental disorders." But evidence contradicting the GAF 50 exists within the same report which determined it, that of Dr. Parayno. Dr. Hedberg merely explained that finding in the context of Dr. Parayno's report, in which Dr. Parayno concludes that "nothing organic . . . would explain [plaintiff's] physical symptoms," and that plaintiff's failure to attain a higher-functioning GAF was voluntary. Dr.

Hedberg also points out that Dr. Parayno's report fails to enumerate a disability causing symptoms consistent with a GAF 50. It was not error for the ALJ to rely on Dr. Hedberg's critique of Dr. Parayno's GAF finding.

Plaintiff contends that Dr. Hedberg's discussion of the conflict between Dr. Parayno and Dr. Jeffers is meaningless, because both concur that plaintiff's impairment was at least moderate. Plaintiff's argument is sound, if the GAF rating of both Dr. Parayno and Dr. Jeffers are reliable. But as previously discussed, the ALJ did not err in disregarding Dr. Parayno's GAF rating as it was inconsistent with other evidence and analysis in Dr. Parayno's report. Regarding Dr. Jeffers's GAF rating, the ALJ found independent evidence supported Dr. Hedberg's conclusion that plaintiff's depression was not disabling. AR 23 (discussing other physician's medical reports and a prescription for Elavil, which indicated plaintiff's depression was mild). Because substantial evidence supports a finding that neither Dr. Parayno and Dr. Jeffer's GAF were reliable, plaintiff's objection on this ground is over-ruled.

Plaintiff argues that Dr. Hedberg's testimony was heavily weighted with cultural bias. Dr. Hedberg attempted to explain the opinions of both Dr. Fielding and Dr. Parano [sic], who stated that plaintiff's failure to participate in daily activities was due to a voluntary dependence on family members, a trait found acceptable in the Hmong/Mien cultures. Dr. Hedberg found Dr. Fielding's and Dr. Parano's [sic] opinions consistent with articles and other literature that Dr. Hedberg had read on that topic concerning Southeast Asians generally. Dr. Hedberg also found this explanation persuasive in plaintiff's case.

Dr. Hedberg's cultural explanation was shared by two other experts, who agreed that plaintiff's symptoms were, in part, voluntary. Plaintiff does not argue that the other two physicians were culturally biased. Nor does the explanation, even if seen as bias, negate that the record lacks objective evidence, found credible by the ALJ, that plaintiff is disabled. To the contrary, the record contains consistent findings by various physicians and experts that, upon examining plaintiff or her medical records, insufficient evidence of a disability exists.

Plaintiff does not assert that the ALJ was biased, as the factfinder in the proceedings. The ALJ's opinion reflects only partial reliance on Dr. Hedberg's unchallenged cultural explanation, focusing primarily on the lack of objective evidence to support plaintiff's claim. Because the record does not indicate that plaintiff's case was affected by alleged cultural bias, this objection is over-ruled.

Because plaintiff's objections to the Magistrate's report and recommendation are overruled, and the standard of review under 28 U.S.C. § 636(b)(1) having been met, IT IS ORDERED that the Magistrate's report and recommendation is ADOPTED;

FURTHER ORDERED that plaintiff's motion for summary judgment and/or remand is DENIED;

FURTHER ORDERED that defendant's motion for summary judgment is GRANTED.

DATED: July 14, 1994.

SO ORDERED.

/s/ Oliver W. Wanger
Oliver W. Wanger
UNITED STATES
DISTRICT JUDGE

C:/Saelee.2

UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

CHIAD SAELEE, (S.S. #566-91-7485, Plaintiff, vs. SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	CV-F-93-5220-OWW-DLB REPORT AND RECOMMENDATION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT/REMAND AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, Chiad Saelee, seeks judicial review of a final decision of the Secretary of Health and Human Services ("Secretary") denying her application for disability-based supplemental security income ("SSI") benefits pursuant to Title XVI of the Social Security Act ("Act"). Jurisdiction exists under 42 U.S.C. § 405 (g).

FACTS AND PRIOR PROCEEDINGS

Plaintiff filed two applications for disability-based SSI benefits. An April 15, 1988 application (alleging disability since January 15, 1985 due to hearing and vision loss and blackouts) was denied initially and upon reconsideration. Mrs. Saelee requested a hearing on October 6, 1988. Prior to a hearing, she withdrew her request and on April 26, 1989, a dismissal order was issued by an Administrative Law Judge ("ALJ"). Mrs. Saelee subsequently filed another application on December 6, 1989, (alleging disability since February 1, 1975 due to headaches, vision and hearing loss, blackouts, dizziness, and

chest pain) which was denied initially and after reconsideration. An ALJ conducted a hearing on October 23, 1990, and issued an adverse decision on January 24, 1991.

The plaintiff requested review of the ALJ's decision by the Appeals Council, which remanded on September 16, 1991. The Appeals Council directed a reevaluation of plaintiff's mental condition and a vocational expert's testimony. The plaintiff appeared with counsel, Mr. Robert Ishikawa. She testified before an ALJ with the assistance of both a Laotian and Mien interpreter.

Mrs. Saelee was born in Laos on June 14, 1950. She has no formal education and is illiterate in English. (AR 25) Her only employment was in Laos as a rice farmer. She emigrated to Thailand for ten years, then to the United States. (AR 271)

Mrs. Saelee's medical complaints include sinusitis, hypertension, chronic lower back pain, chronic leg pain, vision and hearing loss, and depression. She has been diagnosed and successfully treated for sinusitis and hypertension. (AR 401)

All the medical reports state no objective medical basis was found for the claims of chronic back and leg pain, severe depression and severe vision impairment. (AR 182, 223, 234, 235, 238, 239, 241, 250, 296, 336, 417, and 443)

Plaintiff's hearing loss has been tested in 1987, 1988, and 1990. The audiometric testing showed no hearing response in her right ear and decreased hearing response in her left ear. She was given a hearing aid and subsequently a more powerful hearing aid which increased her

hearing ability as well as her speech reception threshold. (AR 423) Evidently, she can understand normal conversation when wearing the aid. (AR 241, 250, and 336)

Plaintiff also claims bilateral vision loss. A pterygium[1] in her left eye extending over the corneal margin was removed. (AR 234, 333) Dr. Graham administered a visual evoked response test. The results were normal. Dr. Graham reported widely varying visual acuity, and although the visual fields examination was grossly abnormal, he did not consider it diagnostic. (AR 238) In addition, other physicians noted that plaintiff was able to successfully maneuver around obstacles in their offices, despite her claims of blindness. (AR 234, 333) Dr. George Porter's January 12, 1990 report states he found the pterygium had reoccurred over the left eye, but both lenses were clear. There was no evidence of hemorrhages or exudates. However, Dr. Porter found a small amount of simple myopic astigmatism in both eyes, secondary to hysteria or malingering. No pathological evidence existed to support her claimed visual disability. (AR 333)

Mrs. Saelee has claimed depression for several years. (AR 443) She has received psychiatric examinations (AR 235, 250, 347, and 431) and counseling from the Merced County Department of Mental Health. (AR 431) Plaintiff was referred to Southeast Asian woman's group therapy for socialization. The psychiatric consultants and treating physicians gave various diagnoses including unspecified

---

[1] A fleshy growth of conjunctiva (lines the back of the eye lid) onto the cornea. The *Merck Manual*, 15th Ed., Pg. 2218

depressive disorder, undifferentiated somatoform disorder (AR 235); mild depression and multiple somatic complaints (AR 244); hypochondriasis (AR 347); major depression, single episode, and somatization disorder (AR 431); possible malingering with motives of secondary gain (AR 250); and somatization, dependent-personality disorder, auditory impairment and culture shock. (AR 443 and 486) Additionally, plaintiff's counselor reported she was well oriented, had a good memory, but had poor insight. (AR 431-438)

Dr. Aleman, a treating physician, stated that Mrs. Saelee's ailments taken as a whole would make it very unlikely that she could perform any sedentary job. (AR 429) Dr. Hedberg's consultative report on the other hand, states that in view of all the medical evidence, Mrs. Saelee's symptoms are mild in nature, and are based largely on culture shock factors. When taken as a whole they would not prevent her from performing sedentary work. (AR 467) Additionally, the Vocational Expert, Dian Bower, testified that, considering her limitations, plaintiff can perform light sedentary work. (AR 143)

Based upon this record, the ALJ issued his decision on January 24, 1991 denying plaintiff's claim for benefits. Thereafter, the Appeals Council denied Mrs. Saelee's request for review of the hearing decision and on April 2, 1993, plaintiff timely filed her complaint in this case.

The matter is currently before the Court on plaintiff's Motion for Summary Judgment/Remand and Defendant's Cross-Motion for Summary Judgment, which were referred, without oral argument, to Dennis L. Beck, United States Magistrate Judge, pursuant to 28 U.S.C.

§ 636 (b)(1)(B) and Rule 305 of the Local Rules of Practice for the United States District Court, Eastern District of California, for a Report and Recommendation. For the reasons that follow, the Magistrate Judge recommends that the Court affirm the Secretary's final decision denying plaintiff benefits.

SCOPE OF REVIEW

Congress has provided a limited scope of judicial review of the Secretary's decision to deny benefits under the Act. In reviewing findings of fact with respect to such determinations, the court must determine whether the decision of the Secretary is supported by substantial evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla," [*Richardson v. Perales*, 402 U.S. 389, 402 (1971)], but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson, supra*, 402 U.S. at 401. The record as a whole must be considered, weighing both the evidence that supports and the evidence that detracts from the Secretary's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the evidence and making findings, the Secretary must apply the proper legal standards. *E.g., Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Secretary's determination that the plaintiff is not disabled if the Secretary applied the proper legal standards, and if the Secretary's findings are supported by substantial evidence. *See, Sanchez v. Secretary of Health and Human Services*, 812 F.2d 509, 510 (9th Cir. 1987).

REVIEW

In order to qualify for benefits, a plaintiff must establish that she is unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment which has lasted or can be expected to last for a continuous period of not less than 12 months. 1382c (a)(3)(A) (SSI disability benefits). A claimant "will be found disabled only if the impairment is so severe that, considering his age, education, and work experience, he is unable to 'engage in any other kind of substantial gainful work which exists in the national economy.' " 1382c (a)(3)(B) (SSI disability benefits).

In an effort to achieve uniformity of decisions, the Secretary has promulgated regulations which contain, inter alia, a five-step sequential disability evaluation process. 20 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f) (1993)[2]. Applying steps one through three of this process, the ALJ found that: (1) Plaintiff has not engaged in substantial gainful activity since April 15, 1988, the date of her prior application; (AR 25) (2) plaintiff suffers from sinusitis, mild depression, a corrected severe hearing impairment, and a visual impairment; but (3) she does not have an impairment, or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. Therefore, disability cannot be established pursuant to 20 C.F.R. § 416.920(e). (AR 24-26)

At step four, the ALJ found that plaintiff was unable to perform sedentary work requiring binaural hearing.

---

[2] All references are to the 1993 version of the Code of Federal Regulations unless otherwise noted.

The ALJ also found that plaintiff's mild depression complicated by her cultural background affects her ability to understand and follow complex instructions. (AR 25)

At step five, the ALJ found that a significant number of other jobs existed which plaintiff remained capable of performing and thus concluded that Mrs. Saelee was "not disabled." (AR 25)

On appeal, plaintiff claims the ALJ's finding of no severe mental impairment was not supported by substantial evidence. The ALJ's findings do not specifically state that plaintiff has "no mental impairment", simply that she has a "severe" impairment associated with a loss of hearing in her right ear, with a factitious disorder or mild depression, (AR 24) but " . . . she does not have an impairment or combination of impairments listed in, or medically equal to one listed in, Appendix 1, Subpart P, Regulations No. 4." (AR 24)

At step two of the sequential disability analysis, the "severity regulation" provides that "[i]f you do not have any impairment . . . which significantly limits your . . . ability to do basic work activities, we will find that you do not have a severe impairment and are therefore, not disabled. We will not consider your age, education, and work experience." 20 C.F.R. § 416.920(c). The validity of the severity regulation was confirmed by the United States Supreme Court in *Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987).

Under this regulation, the Secretary must determine, "on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe." *Yuckert*,

482 U.S. at 147, 107 S.Ct. at 2296, 96 L.Ed.2d 119 (1987) citing S.Rep. No. 98-466 p. 22 (1984) (the Senate Report which accompanied the 1984 amendments to the Act.) Where they are not, "[the claimant] is not eligible for benefits, and there is no reason for the Secretary to consider [the claimant's] age, education, and work experience." Id.

The Ninth Circuit, on remand from the U. S. Supreme court, in *Yuckert v. Bowen*, 841 F.2d 303 (9th Cir. 1988), took the position that the current severity regulation is to be read in light of the earlier regulations defining severe impairment adopted in 1968, since the new terminology was intended to clarify, not to change, the definition of "severe impairment." id., at 306. The 1968 regulations defined a non-severe impairment as, " . . . a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of abnormalities." 20 C.F.R. § 404.1520 (a) (1968).

The Court noted that the Secretary's interpretation of "not severe" impairments contained in Social Security Ruling ("SSR") 85-28 also suggests that the severity regulation should be applied in light of the 1968 regulation.[3] *Yuckert, supra*, 841 F.2d at 306. According to this ruling, an impairment or combination of impairments is found "not severe" and a finding of "not disabled" will be made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have *no more than a minimal effect* on an

---

[3] The Yuckert Court declined to construe SSR 85-28. *Yuckert, supra*, at 1564, n. 12.

individual's ability to work, even if the claimant's age, education, or work experience were specifically considered.

A mental impairment will be found to be non-severe if the rating for daily living and social functioning is none or slight, the rating for concentration, persistence and pace is never or seldom, and the rating for deterioration or decompensation in work or work-like settings is never. 20 C.F.R. § 416.920a (c)(1)

In this case, the ALJ concluded that plaintiff did not suffer from a "severe" mental impairment as contemplated by the regulations. This finding is supported by substantial evidence of record. Several doctor's consultative reports and treating physicians reports found plaintiff to be suffering from mild depression, hypochondriasis, and/or slight personality disorder. (AR 244, 347). None of the doctors found evidence of psychotic process, nor that plaintiff was delusional or hallucinating. (AR 235, 244, 250, 347, 431, 443, and 486). Dr. Parayno diagnosed the plaintiff's Global Assessment of Functioning[4] ("GAF") at 50. (AR 347) However, Dr. Hedburg testified that 50, the scale mid point, is sometimes given without consideration to its implications. Further, if a low level of functioning exists, it is due to plaintiff's cultural assimilation problems, not a psychiatric disorder. (AR 122) Dr. Hedburg also took into account the lack of any

---

[4] The clinician can give an overall judgment of a person's psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness, excluding physical or environmental limitations. *Diagnostic and Statistical Manual of Mental Disorders*, 3rd Ed Revised, Pgs. 12, 20

medical basis for plaintiff's complaints. In a 1992 report, Dr. Jeffries gave a GAF of 21. (AR 486) Dr. Hedburg testified that this low figure conflicts with Dr. Jeffries diagnosis of moderate impairments. The low GAF rating may be a result of plaintiff's total but voluntary dependence on her family to take care of her. (AR 132)

The Court finds these consultative reports constitute substantial evidence from which the ALJ could find that plaintiff does not suffer from a "severe" mental impairment. Although the reports from Dr. Aleman show variances in plaintiff's depression, it is the ALJ who must interpret the evidence. Neither the District Court nor the Court of Appeals can substitute its own determination of what the evidence shows for the ALJ's conclusion if there is sufficient evidence to support the ALJ's outcome. *Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985).

Similarly, the ALJ found that plaintiff's lower back pain, dizziness, loss of vision, sinusitis, and hypertension are not "severe" impairments. (AR 24) There is no objective evidence of record that shows plaintiff suffers from an impairment that is reasonably likely to cause the above complaints other than the severe hearing loss, which is corrected with a hearing aid. Therefore, the ALJ was correct in finding them "not severe" and in discounting plaintiff's testimony regarding pain under Social Security Ruling 88-13 and *Varney v. Secretary of Health and Human Services*, 859 F.2d 1396 (9th Cir. 1988).

Additionally, plaintiff appeals the ALJ's rejection of a treating source opinion of disability. Plaintiff contends the ALJ failed to provide sufficient reasons to justify

rejection of her treating physician's opinion. More specifically, plaintiff argues that it was error for the ALJ to rely on the opinion of a nontreating physician in place of her treating physician, Dr. Aleman's opinion. The Court disagrees.

The Ninth Circuit has held that a treating physician's opinion is to be afforded great weight in disability cases because he "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). The treating physician's opinion is not, however, conclusive as to either a claimant's physical condition or the ultimate issue of disability and may be disregarded by the ALJ even where it is not contradicted. *Rodriguez v. Bowe*, 876 F.2d 759, 761-62 & n. 7 (9th Cir. 1989); *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986) To reject the uncontroverted opinion of a treating physician, the ALJ must set forth clear and convincing reasons for doing so. *Rodriguez, supra*, 876 F.2d at 761-62. Where the opinion of the treating physician conflicts with that of an examining physician, the ALJ must present "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Magallanes v. Bowen*, 881 F.2d 747 (9th Cir. 1989) (citations omitted). This rule does not apply when a nontreating physician bases his opinion on independent clinical findings which differ from those of the treating physician. *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir. 1985). When a nontreating physician's opinion rests on objective clinical tests, it must be viewed as substantial evidence. *Id.*

The record in this case has shown that Dr. Hedberg's consultative report is based on his review of all the

doctor's reports with their underlying clinical findings, including Dr. Aleman's records. Dr. Hedberg's expert opinion is that plaintiff's mild symptoms taken as a whole, would not prevent performance of sedentary work. (AR 467) Therefore, the record contains substantial evidence supporting the ALJ's decision denying plaintiff benefits.

CONCLUSION

Based on the foregoing, the Magistrate Judge recommends that the final decision of the Secretary denying the plaintiff benefits be AFFIRMED. I further recommend that plaintiff's Motion for Summary Judgment and/or Remand be DENIED and defendant's Motion for Summary Judgment be GRANTED.

This report and recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 631 (b)(1)(B) and Rule 305 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within ten *court* days (plus three days if served by mail) after being served with a copy, any party may serve on opposing counsel and file with the court written objections to such proposed findings and recommendations. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendations." Replies to the objections shall be served and filed within ten (10) *court* days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1).

FAILURE TO FILE OBJECTIONS WITHIN THE SPECIFIED TIME WAIVES THE RIGHT TO APPEAL THE MAGISTRATE JUDGE'S FACTUAL FINDINGS, BUT WILL NOT AFFECT YOUR RIGHT TO APPEAL THE CONCLUSIONS OF LAW.

DATED: March 16, 1994

/s/ Dennis L. Beck
DENNIS L. BECK
United States Magistrate
Judge

(Seal) Social Security Administration
DEPARTMENT OF HEALTH
& HUMAN SERVICES

Refer to: S3GCP
566-91-7485

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

MAR 9 1993

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Ms. Chiad O. Saelee
549 Canal St.
Merced, CA 95340

Dear Ms. Saelee:

The request for review of the Administrative Law Judge's decision in your case has been considered.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record. (These provisions are contained in 20 CFR 404.970 for Social Security claims

under Title II of the Social Security Act and in 20 CFR 416.1470 for Supplemental Security Income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the secretary in your case.

The Appeals Council also considered the arguments made by your representative in the letter dated September 22, 1992 and the April 2, 1992 statements made by Dr. Aleman, but decided they provided no basis to change the hearing decision. The information provided by Dr. Aleman basically represents a rephrasing of his prior assessment. The Administrative Law Judge acknowledged that opinion and cited reasons (which are supported by the record) for not accepting it.

In addition, the medical expert and the Administrative Law Judge explained why they were not accepting certain findings or conclusions contained in the reports of record. The medical expert stated that he considered all the reports of record, and provided specific information in support of his opinions regarding the severity of your mental problems. In addition to the medical expert, two psychiatrists also discussed the effect of cultural considerations on your ability to function. Further, your representative raised no objection during the oral hearing regarding Dr. Hedberg serving as a medical expert.

Although the Psychiatric Review Technique form appended to the decision reflects your mental problems to be "non-severe," the Administrative Law Judge determined that you cannot perform work involving complex instructions. Moreover, the vocational expert took that limitation into account when she cited the jobs the hypothetical individual could perform. As far as your alleged physical problems, the record shows that those complaints have not been confirmed by clinical and laboratory diagnostic techniques, as required by section 223(d)(3) of the Social Security Act.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for claims under Title II and in section 1631(c)(3) of the Act (42 U.S.C. 1383(c)(3)) for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of

Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Catherine Ravinski
Administrative Appeals Judge

cc:
Robert Ishikawa, Esq.
HO, Fresno, CA (ALJ Dail, Jr.)

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	**CLAIM FOR**
Chiad Orn Saelee (claimant)	Supplemental Security Income
_____ (Wage Earner)	566-91-7485 (Social Security Number)

STATEMENT OF THE CASE

The claimant filed an application for supplemental security income benefits on April 15, 1988, which was denied initially and after reconsideration. She filed a request for

hearing on October 6, 1988; however, she withdrew her request prior to a hearing, and a dismissal order was issued by an Administrative Law Judge on April 26, 1989. Thereafter, she filed her current application on December 6, 1989, which was denied initially and after reconsideration. I conducted a hearing on October 23, 1990, and issued an adverse decision on January 24, 1991.

The claimant requested review of my decision by the Appeals Council, which remanded by order dated September 16, 1991, directing reevaluation of the claimant's mental condition and testimony of a vocational expert. The record was developed further as described herein, and a supplemental hearing was held in Fresno, California, on April 7, 1992. Testifying at the supplemental hearing were Dr. Allan G. Hedberg, a psychologist and medical expert, and Ms. Dian Bower, a vocational expert. The claimant is represented by Mr. Robert Ishikawa, Attorney at Law.

The general issue in this case is whether the claimant is under a "disability" within the meaning of section 1614 of the Social Security Act. The specific issues to be decided are whether the claimant has any severe, medically determinable physical or mental impairment(s) which make the claimant unable to engage in any substantial gainful activity; whether any such impairment(s) found can be expected to result in death or last for a continuous period of not less than 12 months; and, if found disabled, when such disability began.

In order to resolve these issues, a five-step sequential evaluation process has been established under 20 CFR 416.920. In applying those sequential steps, after having

reviewed with care all the documentary evidence of record, and after having considered the testimony at the hearings and arguments made on the claimant's behalf, I conclude that work which the claimant is capable of performing exists in significant numbers in the economy. Consequently, it must be found that the claimant is not disabled within the meaning of the Act.

RATIONALE

The claimant was born on June 14, 1950, and is 42 years of age. She has not received any formal education and is unable to read, write, speak or understand English. The claimant has not engaged in substantial gainful activity in the past 15 years. Disability is alleged due to a combination of problems associated with hearing, blackouts, vision, chest pains, seizures and depression (Exhibit 6).

The medical record details care associated with childbirths on December 28, 1987, and March 1, 1990. During her second pregnancy, the claimant developed diabetes mellitus and was placed on insulin therapy (Exhibit 39). Subsequent to the latest birth, she had an episode of postpartum depression and was referred to a mental health clinic (Exhibit 40). The claimant has been treated symptomatically for sinusitis, taking primarily Actifed. Additionally, it was noted that the claimant was hypertensive, and she was prescribed medication which controlled the condition reasonably well (Exhibit 41). Audiometric testing was performed in 1987, 1988 and 1990, and it was noted that she had no hearing response in her right ear and decreased hearing in her left ear. The latter was improved with a more powerful hearing aid,

and her speech reception threshold was also increased significantly (Exhibit 42). When she wears her hearing aid, it appears that the claimant is able to understand normal conversation without difficulty (Exhibits 18; 20; 37, p. 1).

Although the claimant claims bilateral loss of vision, the only objective medical finding was a pterygium in the left eye extending over the corneal margin, and even this was removed (Exhibits 14, 35). She underwent a visual evoked response test which was essentially normal (Exhibit 16). Dr. Gary C. Graham reported widely varying visual acuity, and although his examination was grossly abnormal, he did not consider it diagnostic (Exhibit 16). Attending physicians reported in 1988 and 1990 that, although she claimed she was blind, the claimant was able to maneuver around obstacles in their offices without difficulty (Exhibits 14, 35). A report by Dr. George W. Porter dated January 12, 1990, indicates he had treated the claimant off and on for her decreased vision. The only relevant finding included a pterygium which had recurred over the left eye, although her lenses were clear. There was no evidence of any hemorrhages or exudates. Refraction testing revealed a small amount of simple myopic astigmatism in both eyes. It was Dr. Porter's assessment that the claimant had amblyopia probably secondary to hysteria or malingering. There was no evidence to demonstrate a pathology which would account for her claimed visual disability (Exhibit 35).

The claimant has undergone several consultative and other psychiatric examinations (Exhibits 15, 20, 38, 44). They resulted in various diagnoses, to include depressive disorder, not otherwise specified; undifferentiated

somatoform disorder, (Exhibit 15); hypochondriasis (Exhibit 38); major depression, single episode, and somatization disorder (Exhibit 44); and possible malingering (Exhibit 20). Counseling notes from the Merced County Department of Mental Health (Exhibit 44) indicate the claimant underwent counseling from a social worker, Sao Yang, M.S.W., and was prescribed Amitriptyline. She was also referred to ongoing women's group therapy for socialization and peer support. Her counselor reported that the claimant was able to communicate through an interpreter. Her memory was described as being good and she was well oriented, although she was described as having poor insight (Exhibit 44).

A consultative psychiatric examination performed by Dr. Maximo A. Parayno on February 17, 1990, found the claimant alert, although she was not well oriented to place or person. Her affect was flat, and her mood appeared mildly depressed. The claimant was relevant in her responses. Because of her lack of education, she could not perform serial sevens. Dr. Parayno diagnosed hypochondriasis. He specifically noted that upon review of the medical records, there was no organic basis for her physical symptoms. She did not have a history of serious medical problems related to an injury or infection. Although the claimant continued to complaint of sensory deficits, primarily related to her vision, these complaints were not corroborated by the record. Her activities of daily living were restricted, but this was consistent with her culture in which such an individual becomes completely dependent and her needs are met by other family members (Exhibit 38).

Reports in 1988 from the Family Practice Clinic also contain the assessment of depression with multiple somatic complaints (Exhibit 19).

The report of Dr. David W. Rodgin (Exhibit 15), another psychiatric consultative examiner on June 7, 1988, indicated the claimant was able to respond to the translator's questions although she did not always provide the information. Dr. Rodgin opined the claimant would gain some benefit from attending her immigrant group meetings on a more regular basis. He indicated her symptoms were in the categories of a depressive disorder, not otherwise specified, and also an undifferentiated somatoform disorder. Dr. Rodgin stated these symptoms were potentiated by severe cultural shock. Dr. Rodgin reported that when the claimant began the interview, she did not have any type of noticeable limp, but upon leaving the room after the evaluation, she limped heavily on the right side.

A consultative psychiatric examination by Dr. Wesley Fielding on September 6, 1988, similarly did not report any type of psychiatric disability and indicated possible malingering and secondary gain (Exhibit 20).[1]

---

[1] At the supplemental hearing, the claimant's attorney objected to Exhibit 20, which had already been admitted into evidence without objection. He based his objection upon the fact that Dr., Fielding had used two interpreters. This motion/objection is denied. It goes to the weight of the evidence not its admissability. As Dr. Hedberg, the medical expert, testified and as discussed below, this practice sometimes must be followed because of the exigencies of interpretation (the claimant's native language is Mien) and must be considered in assigning the appropriate weight to an evaluation. Dr. Hedberg considered this interpretation difficulty in arriving at his opinion.

The claimant was treated in 1989 by Dr. John Aleman of the Childs Avenue Clinic (Exhibits 37, 43). Dr. Aleman reported that her hearing loss was not too severe. She can hear the spoken word when she wears a hearing aid on the left side. He reported there was no muscle loss, atrophy or objective findings or abnormalities to account for her subjective complaints of dizziness or tendency to limp. He reported she had a grossly normal affect. There was no evidence of muscle weakness in either the lower or upper extremities. Dr. Aleman was unable to demonstrate any clear neurological deficits. He noted that the language barrier and the claimant's tendency to somaticize made diagnoses even more difficult. Various medications including antidepressants and nonsteroidal anti-inflammatories were tried for her various complaints with little symptomatic improvement. At the request of the claimant's representative, Dr. Aleman submitted on August 9, 1990, a letter regarding the claimant's multiple medical problems, indicating many were caused by or related to a post-traumatic stress syndrome, depression or anxiety. He reported she had anatomical disorders including a left-sided cataract, bilateral hearing loss, and chronic sinusitis. He reported she experienced chronic left leg pain of uncertain etiology that resulted in a limp and unsteady gait and chronic dizziness of uncertain etiology. He was unable to demonstrate any clear neurological or anatomical lesions to explain her chronic left leg pain or chronic lower back pain; however, he believed this was secondary to degenerative joint disease of the spine, even though no such condition was demonstrated on x-ray. It was his opinion that none of the problems the

claimant had individually would prevent her from pursuing a sedentary job; however, her history of lower back pain, leg pain, dizziness, hearing loss, visual difficulties, depression and anxiety taken as a whole make it very unlikely that she could realistically perform any sedentary job (Exhibit 43).[2]

Subsequent to the initial hearing, reports were submitted from Dr. Robert B. Culberson dating from August 13 to October 16, 1990. This was outpatient care associated with sinusitis, which was treated conservatively. A CT scan of the claimant's sinuses revealed only mild ethmoid sinusitis (Exhibit 46, p. 2).

Additionally reports were supplied from the Merced County Department of Mental Health dating from May 1990 through February 1992. These reports describe the claimant as suffering from a somatization and dependent-personality disorder as well as an auditory impairment and culture shock. She was referred to a woman's support group, with little apparent improvement in her symptoms. Specifically, she complained of multiple physical problems, to include blackouts when she became

---

[2] I find specific, legitimate reasons for disregarding this opinion. It was given for the purpose of this proceeding and differs significantly from the doctor's treatment notes as well as being contradicted by other medical findings and opinions in the record. The opinion is worded in such a way that it strikes me as an effort by the physician to assist a patient even though there is no objective medical basis for the opinion. Perhaps most important is the concession by Dr. Aleman that he was unable to establish any organic basis for most of her complaints and was relying on her subjective allegations. As discussed later, I find those allegations to be entirely untrustworthy.

angry, lack of energy, chest pains, headaches, back pains, and an intermittent inability to move or speak (Exhibits 47, 55).

I referred the medical evidence to Allan G. Hedberg, Ph.D., a clinical psychologist and medical expert. He submitted a written report of November 13, 1991 (Exhibit 50; hereinafter referred to as the Hedberg Report), and he was cross-examined at the supplemental hearing. The Hedberg Report notes that the claimant's complaints included chronic leg pain, chronic visual complaints, chronic hearing loss, an alleged seizure disorder, chronic generalized pain syndrome, and chronic complaints of dizziness, coughing, bronchitis, gastritis and sinusitis. The claimant's subjective complaints were not substantiated by any anatomical, physiological or psychological diagnostic procedures. Rather, these complaints were either rejected or suggested to be of a mild nature and not a basis to conclude that she was disabled (Exhibit 50, p. 2). Overall, Dr. Hedberg did not believe that any of the claimant's impairments were severe even if they did have a legitimate basis. His analysis included consideration of the fact that the claimant may be setting forth a factitious disorder for secondary gain. Dr. Hedberg commented that the claimant did have a positive response to the combination of medication, immigrant group therapy and general advice regarding the care of her children. The claimant's symptoms may be aggravated by a cultural conflict of wanting to return to Southeast Asia as compared to staying in the United States where she feels pressured to learn English and become adjusted to American culture (Exhibit 50, p. 4).

At the supplemental hearing, Dr. Hedberg testified that he has read psychological literature involving Southeast Asians, specifically involving psychological testing, psychotherapy, religion, and culture. Based upon his training as a psychologist, he is capable of analyzing medical reports, although he does not make diagnoses as a medical doctor would. Additionally, he has taught courses on functional overlay and managed the pain clinic at the Fresno Community Hospital. In reference to his comment on Exhibit 50, p. 3, that the claimant had negative audiological findings, Dr. Hedberg stated that the claimant's allegations that she was not able to hear were not consistent with the findings in the record which establish that she could hear normal conversational tones with her left ear. He noted that six or seven other reports in the record spoke to this issue. Overall, the record establishes that her hearing is not dysfunctional. In reference to Exhibit 50, p. 2, paragraph 7, Dr. Hedberg clarified that the psychiatrists he relied on primarily were Drs. Fielding and Parayno, and to a lesser degree, Dr. Rodgin. The conclusions expressed in paragraph 7 of his report were based on Exhibits 15, 20 and 38. Dr. Parayno's evaluation supported the existence of a cultural component to the claimant's symptoms with minimal psychiatric factors. He is of the opinion that the claimant suffers from only mild depression, with most of her symptoms being associated with cultural factors. There were no organic bases for the claimant's subjective complaints. Her problems are mainly associated with cultural adaption, as opposed to being of a psychiatric nature. He stated that cultural factors mitigate psychiatric conditions, and if conduct is normal in a culture, it is not considered a psychiatric

disorder. Dr. Hedberg stated that a factitious disorder is a psychiatric disorder which involves alleging symptoms in order to obtain a sick role. He distinguished it from malingering when it is done to obtain a specific identifiable goal such as benefits or family support. He described hypochondriasis as care-seeking behavior with no organic basis; essentially it is attention seeking. A dependent personality is not, per se, a psychiatric disorder, but rather, a lifestyle. Based upon his experience, Dr. Hedberg stated that conduct similar to the claimant's is not uncommon in the claimant's culture.

In reference to the global assessment of functioning of 50 provided by Dr. Parayno, Dr. Hedberg stated that this is inconsistent with the findings in Dr. Parayno's report, and he noted that many practitioners select "50" as the midpoint of the scale with no particular underlying rationale. Although Dr. Fielding did not have a certified interpreter directly familiar with the claimant's language, he did appear to use caution in interpreting the responses provided by the interpreters who were present. Dr. Hedberg stated that responses in this manner are considered along with the observations of the psychiatrist in order to weigh consistency and credibility. Simply because Dr. Fielding used a three-way interpretation did not mean that his report was invalid, and at times, Dr. Hedberg has been forced by circumstances to use similar procedures. With respect to Dr. Fielding's discussion of the claimant's lack of daily activities, in terms of the Hmong and Mien culture, Dr. Hedberg reported that studies have been performed in Southeast Asian Centers in St. Paul and San Diego, and there are numerous psychological publications which have spoken to this matter. In Dr. Hedberg's

professional opinion, such conduct is within the Hmong/Mien cultural pattern.

In reference to the Hedberg Report, Dr. Hedberg stated that his comments on page 2, last paragraph, relate to the lack of anatomical, physiological or psychological findings supporting the claimant's complaints. This assessment is substantiated by the report of Dr. Fielding and by Exhibits 15, 35, 38, 41 and 43. Dr. Hedberg stressed that he was not taking the claimant out of her culture and judging her by standards of the American culture. He pointed out that culturalization is not a medical problem, but is a social problem. In his opinion, the overall evidence establishes that Ms. Saelee has only mild depression which is enhanced by her cultural background.

With respect to Exhibit 44, page 3, which is the purported assessment of Dr. Jeffers as the claimant's treating physician, Dr. Hedberg pointed out that Dr. Jeffers was not the claimant's treating physician, but rather, her therapist was a Ms. Lee. Dr. Hedberg stated that it is common for county mental health physicians to sign off on reports in this manner. Exhibits 35, 38 (page 2), 43 (page 2), and 44 all support his conclusion that the claimant suffers from only mild depression. This conclusion is consistent with the prescription of Elavil, which is often used in connection with mild depression or to help a person sleep. In Dr. Hedberg's opinion a global assessment of functioning of 45 (Exhibits 44, p. 3; 21, p. 1) is not consistent with the description of the claimant in the medical reports. Those reports indicate the claimant has a moderate degree of depression which would be inconsistent with this global assessment of functioning, which would mean that the claimant was totally dependent. Dr. Hedberg's medical

assessment (Exhibit 50, pp. 10-12) used the definitions of "fair" and "good" as they are defined in the assessment form (Exhibit 50, p. 10).

At the initial hearing, the claimant testified that she did not know her age, date of birth, or if she had any education. She reported performing subsistence farming in Laos raising corn, rise, chickens and cattle. The claimant was unable to recall how many children she had and did not know the names of any of her treating physicians. Generally, Ms. Saelee alleged poor memory and visual and hearing loss. However, I noted that she was able to hear the interpreter who sat on her left side. The claimant alleged that she suffered from pain involving her waist, legs, and right knee. Because of her symptoms, she allegedly had difficulty sleeping. The claimant walked with a four-pronged cane, but could not explain why she needed to use it. She stated that she cries often because her life is not happy. The claimant could not relate whether she lived in an apartment or a house but did know that she lived with her husband and children. She did not perform any of the household chores such as cooking, cleaning, or shopping. During a typical day, she took Meclizine one to four times because of dizziness. The claimant previously underwent surgery on her left eye, and claimed that light now causes pain in her eye. She maintained that she could not see or discern the features of the interpreter who was sitting next to her when she wore her dark glasses. When she takes her glasses off, she can see a little light in her right eye but nothing from her left eye. During a typical day, she stays at home and is not active. Her sponsor comes to visit her

occasionally, and her children may take her to the doctors.

I have evaluated the claimant's subjective complaints within the context of SSR 88-13 and 20 CFR 416.929. There is substantial evidence in this record to refute the claimant's allegation of blindness. There is no ocular pathology that would impair her vision, and a treating physician has indicated that her visual acuity is far better than tested. Accordingly, there is no organic pathology associated with her alleged visual loss, and there is likewise no evidence of any associated severe functional loss as evidenced by the report and testimony of Dr. Hedberg. Although the record indicates the claimant is deaf in her right ear, with the use of a hearing aid the hearing in her left ear is improved to near-normal levels. This is further corroborated by an auditory brain stem response which was obtained in September 1988 (Exhibit 42). This impairment would preclude work which requires binaural hearing.

Overall, the nature, location, onset, duration, frequency, radiation and intensity of the claimant's alleged pain and associated symptoms are extremely vague. There is no clear evidence of any precipitating or aggravating factors other than a claimed general inability to function. The claimant is not taking the type or amount of pain medication which is consistent with a severe pain syndrome (Exhibit 56). There was no evidence of any adverse side effects from the medication she takes. The claimant does not have any of the physical findings consistent with chronic pain such as atrophy, muscle spasms, radicular pain, loss of sensation, or decreased strength. The claimant has not received the type of care consistent with

chronic pain such as repeated emergency room visits, use of a TNS unit, acupuncture, biofeedback, or attendance at a pain clinic. As indicated by the persuasive testimony of the medical expert, Ms. Saelee does not have any real functional limitation and could even engage in the heavy levels of exertion. Although the claimant's daily activities are limited, Dr. Hedberg explained that this appears to be more an aspect of her culture than the result of any type of medical problem of a physical or psychiatric nature. Accordingly, based upon the overall record presented, and specifically including the persuasive testimony of Dr. Hedberg, I did not find the claimant's subjective complaints to be credible or probative.

Under the sequential evaluation process, the second determination is whether the claimant suffers from any "severe" medically determinable impairment or combination of impairments, which are defined as more than slight abnormalities that have more than a minimal effect upon the claimant's ability to work (SSR 85-28). The claimant does have a "severe" impairment associated with a loss of hearing in her right ear. She also has a factitious disorder or mild depression, which are considered nonsevere because they only precludes [sic] work which requires complex instructions. Her "severe" impairment does not meet or equal the level of severity discussed in any section of Appendix 1, Subpart P, of Regulations No. 4. Thus, disability cannot be established pursuant to 20 CFR 416.920(e).

At the fourth step, I conclude the claimant possesses the residual functional capacity to engage in an unlimited range of work activity from an exertional standpoint. This record persuasively demonstrates that she does not have

any type of exertional limitation. The only physical limitation is an inability to perform work requiring binaural hearing. My analysis is also corroborated by the opinion of Dr. Hedberg, the medical expert, who testified persuasively at the hearing and supported his opinion by references to the medical record as discussed above. In this regard, he clearly testified that the claimant only suffers from mild depression which is complicated by her cultural background. As indicated, while this is not a "severe" impairment under Social Security law, it does affect the ability to understand and carry out complex instructions.

Once it has been established that an individual does not have any past relevant work history, as here, at step 5 of the sequential process the burden of proof shifts to the Secretary to establish that work which the claimant is capable of performing exists in significant numbers in the economy.

The vocational expert, Dian Bower, was asked to assume an individual 41 years of age without formal education, illiterate and unable to communicate in English, who has an unlimited exertional capacity, but who is unable to perform work which requires binaural hearing or the following of complex instructions. She identified several unskilled jobs which such an individual could perform: factory line worker (approximately 39,000 jobs in the region and approximately 100,000 in the nation); housekeeper (6,100 and 70,000); farm laborer (4,900 and 60,000); vegetable or fruit picker (6,900 and 60,000); dishwasher 3,800 and 35,000); and bench assembler (13,000 and 190,000). In response to questioning by the claimant's attorney, the vocational expert opined that even if the

individual's ability to function independently is seriously limited, this would not affect her ability to perform the jobs identified. They are very structured, with the individual knowing exactly what she has to do, and there is relatively close supervision.

The Secretary sustains his burden by application of Section 204.00 of the Medical-Vocational Guidelines (Appendix 2, Subpart P, Regulations No. 4) as a framework in conjunction with the testimony of the vocational expert. They require a conclusion the claimant is not disabled.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant has not engaged in substantial gainful activity since April 15, 1988, the date of her prior application, up to and through the date of this decision.

2. The medical evidence establishes the claimant has a hearing loss in the right ear, but she does not have an impairment or combination of impairments listed in or medically equal to one listed in, Appendix 1, Subpart P, Regulations No. 4.

3. The claimant's subjective complaints, as discussed in the body of this decision, are not found to be credible.

4. The claimant has the residual functional capacity to perform the nonexertional requirements of work except for work which requires binaural hearing or which

involves complex instructions. There are no exertional limitations.

5. The claimant does not have any past relevant work history.

6. The claimant is 41 years old, which is defined as a younger individual (20 CFR 416.963).

7. The claimant is illiterate and unable to communicate in English (20 CFR 416.964).

8. If the claimant's nonexertional limitations did not significantly compromise her ability to perform work at all exertional levels, section 204.00, Appendix 2, Subpart P, Regulations No. 4 indicates that a finding of not disabled would be appropriate. If her capacity to work at all levels were significantly compromised, the remaining work which she would functionally be capable of performing would be considered in combination with her age, education, and work experience to determine whether a work adjustment could be made.

9. Considering the types of work which the claimant is still functionally capable of performing in combination with her age, education and work experience, she can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy. Examples of such jobs are factory line worker, housekeeper, farm laborer, vegetable and fruit picker, dishwasher and bench assembler. All of these jobs exist in significant numbers in the economy.

10. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 416.920(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the applications filed on April 15, 1988, and December 6, 1989, the claimant is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Social Security Act.

/s/ Joseph G. Dail, Jr.
Joseph G. Dail, Jr.
Administrative Law Judge

July 27, 1992
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

Name: Chiad Orn Saelee SSN: 566-91-7485

Assessment is for: Current Evaluation

Administrative Law Judge's Signature /s/ Joseph G. Dail, Jr. Date July 27, 1992

I. MEDICAL SUMMARY

A. Medical Disposition(s): Impairment(s) Not Severe

B. Based Upon Category(ies): 12.07, 12.08

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[ ]	[x]	C.	12.04	Affective Disorders
[ ]	[x]	D.	12.05	Mental Retardation and Autism
[ ]	[x]	E.	12.06	Anxiety Related Disorders
[x]	[ ]	F.	12.07	Somatoform Disorders
[x]	[ ]	G.	12.08	Personality Disorders

[ ] [x] H. 12.09 Substance Addiction Disorders

F. **12.07 Somatoform Disorders** – Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] A history of multiple physical symptoms of several years duration beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly

2. [ ] [x] [ ] Persistent nonorganic disturbance of one of the following:
   a. [ ] Vision, or
   b. [ ] Speech, or
   c. [ ] Hearing, or
   d. [ ] Use of a limb, or
   e. [ ] Movement and its control (e.g., coordination disturbances, psychogenic seizures, akinesia, dyskinesia), or
   f. [ ] Sensation (e.g., diminished or heightened)

3. [ ] [x] [ ] Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury

4. [x] [ ] [ ] Other: Factitious disorder

G. **12.08 Personality Disorders** – Inflexible and maladaptive personality traits which cause either significant impairment in social or occupational functioning or subjective distress, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Seclusiveness or autistic thinking
2. [ ] [x] [ ] Pathologically inappropriate suspiciousness or hostility
3. [ ] [x] [ ] Oddities of thought, perception, speech and behavior
4. [ ] [x] [ ] Persistent disturbances of mood or affect
5. [ ] [x] [ ] Pathological dependence, passivity, or aggressivity
6. [ ] [x] [ ] Intense and unstable interpersonal relationships and impulsive and damaging behavior
7. [x] [ ] [ ] Other: Dependent personality disorder

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" Criteria of the Listings

The following functional limitations (which apply to paragraph B of listings 12.02-12.04 and 12.06-12.08 and paragraph D of 12.05) exist as a result of the individual's mental disorder(s).

NOTE: Items 3 and 4 below are more than measures of frequency. Duration and effects of the deficiencies (item 3) or episodes (item 4) are discussed in the decision.

Listing(s) under which the items below are being rated: 12.07, 12.08

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

---

1. Restrictions of Activities of Daily Living:

None[ ] Slight[x] Moderate[ ] Marked*[ ] Extreme[ ] Insuff Evid[ ]

---

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[x] Moderate[ ] Marked*[ ] Extreme[ ] Insuff Evid[ ]

---

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[x] Often[ ] Frequent*[ ] Constant[ ] Insuff Evid[ ]

---

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[x] Once/Twice[ ] Repeated*(3+)[ ] Continual[ ] Insuff Evid[ ]

---

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0] (The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHIAD SAELEE, Plaintiff-Appellant, v. SHIRLEY S. CHATER, Secretary of Health and Human Services, Defendant-Appellee.	No. 94-16664 D.C. No. CV-93-5220 OWW (DLB) ORDER (Filed Sep. 6, 1996)

Before: WALLACE and THOMPSON, Circuit Judges, and SEDWICK, District Judge.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Thompson voted to reject the suggestion for rehearing en banc and Judges Wallace and Sedwick so recommend.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

---

* Hon. John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

EVIDENCE

§ 416.912 Evidence of your impairment.

(a) *General.* In general, you have to prove to us that you are blind or disabled. Therefore, you must bring to our attention everything that shows that you are blind or disabled. This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are blind or disabled, its effect on your ability to work on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.

(b) *What we mean by "evidence."* Evidence is anything you or anyone else submits to us or that we obtain that relates to your claim. This includes, but is not limited to:

(1) Objective medical evidence, that is, medical signs and laboratory findings as defined in § 416.928 (b) and (c);

(2) Other evidence from medical sources, such as medical history, opinions, and statements about treatment you have received;

(3) Statements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work, or any other relevant statements you make to medical sources during the course of examination or treatment, or to us during interviews, on applications, in letters, and in testimony in our administrative proceedings;

(4) Information from other sources, as described in § 416.913(e);

(5) Decisions by any governmental or nongovernmental agency about whether you are disabled or blind; and

(6) At the administrative law judge and Appeals Council levels, certain findings, other than the ultimate determination about whether you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, and opinions expressed by medical advisors based on their review of the evidence in your case record. See § 416.927(f) (2) and (3).

(c) *Your responsibility.* You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled. If we ask you, you must also provide evidence about:

(1) Your age;

(2) Your education and training;

(3) Your work experience;

(4) Your daily activities both before and after the date you say that you became disabled;

(5) Your efforts to work; and

(6) Any other factors showing how your impairment(s) affects your ability to work. In §§ 416.960 through 416.969, we discuss in more detail the evidence we need when we consider vocational factors.

(d) *Our responsibility.* Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports.

(1) "Every reasonable effort" means that we will make an initial request for evidence from your medical source and, at any time between 10 and 20 calendar days after the initial request, if the evidence has not been received, we will make one followup request to obtain the medical evidence necessary to make a determination. The medical source will have a minimum of 10 calendar days from the date of our followup request to reply, unless our experience with that source indicates that a longer period is advisable in a particular case.

(2) By "complete medical history," we mean the records of your medical source(s) covering at least the 12 months preceding the month in which you file your application. If you say that your disability began less than 12 months before you filed your application, we will develop your complete medical history beginning with the month you say your disability began unless we have reason to believe that your disability began earlier.

(e) *Recontacting medical sources.* When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine

whether you are disabled, we will need additional information to reach a determination or a decision. To obtain the information, we will take the following actions.

(1) We will first recontact your treating physician or psychologist or other medical source to determine whether the additional information we need is readily available. We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. We may do this by requesting copies of your medical source's records, a new report, or a more detailed report from your medical source, including your treating source, or by telephoning your medical source. In every instance where medical evidence is obtained over the telephone, the telephone report will be sent to the source for review, signature and return.

(2) We may not seek additional evidence or clarification from a medical source when we know from past experience that the source either cannot or will not provide the necessary findings.

(f) *Need for consultative examination.* If the information we need is not readily available from the records of your medical treatment source, or we are unable to seek clarification from your medical source, we will ask you to attend one or more consultative examinations at our expense. See §§ 416.917 through 416.919t for the rules governing the consultative examination process. Generally, we will not request a consultative examination until

we have made every reasonable effort to obtain evidence from your own medical sources. However, in some instances, such as when a source is known to be unable to provide certain tests or procedures or is known to be nonproductive or uncooperative, we may order a consultative examination while awaiting receipt of medical source evidence. We will not evaluate this evidence until we have made every reasonable effort to obtain evidence from your medical sources.

[56 FR 36963, Aug. 1, 1991]

§ 416.913 Medical evidence of your impairment.

(a) *Acceptable sources.* We need reports about your impairments from acceptable medical sources. Acceptable medical sources are –

(1) Licensed physicians;

(2) Licensed osteopaths;

(3) Licensed or certified psychologists;

(4) Licensed optometrists for the measurement of visual acuity and visual fields (see paragraph (f) of this section for the evidence needed for statutory blindness); and

(5) Persons authorized to send us a copy or summary of the medical records of a hospital, clinic, sanatorium, medical institution, or health care facility. Generally, the copy or summary should be certified as accurate by the custodian or by any authorized employee of the Social Security Administration, Veterans' Administration, or State agency. However, we will not return an

uncertified copy or summary for certification unless there is some question about the document.

(6) A report of an interdisciplinary team that contains the evaluation and signature of an acceptable medical source is also considered acceptable medical evidence.

(b) *Medical reports.* Medical reports should include –

(1) Medical history;

(2) Clinical findings (such as the results of physical or mental status examinations);

(3) Laboratory findings (such as blood pressure, X-rays);

(4) Diagnosis (statement of disease or injury based on its signs and symptoms);

(5) Treatment prescribed with response, and prognosis; and

(6) A statement about what you can still do despite your impairment(s) based on the medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of this section (except in statutory blindness claims). Although we will request a medical source statement about what you can still do despite your impairment(s), the lack of the medical source statement will not make the report incomplete. See § 416.927.

(c) *Statements about what you can still do.* Statements about what you can still do (based on the medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of this section) should describe, but are not limited to, the kinds of physical and mental capabilities listed below. See §§ 416.927 and 416.945(c).

(1) The medical source's opinion about your ability, despite your impairment(s), to do work-related activities such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling; and

(2) In cases of mental impairment(s), the medical source's opinion about your ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and work pressures in a work setting.

(3) If you are a child, the medical source's opinion about your physical or mental abilities to function independently, appropriately, and effectively in an age-appropriate manner, as described in § 416.924d.

(d) *Completeness.* The medical evidence, including the clinical and laboratory findings, must be complete and detailed enough to allow us to make a determination about whether you are disabled or blind. It must allow us to determine –

(1) The nature and limiting effects of your impairment(s) for any period in question;

(2) The probable duration of your impairment; and

(3) Your residual functional capacity to do work-related physical and mental activities.

(e) *Information from other sources.* Information from other sources may also help us to understand how your impairment(s) affects your ability to work or, if you are a child, your ability to function independently, appropriately, and effectively in an age-appropriate manner. Other sources may include, and are not limited to –

(1) Public and private social welfare agencies and social workers;

(2) Observations by people who know you (for example, spouses, parents and other caregivers, siblings, other relatives, friends or neighbors, clergy);

(3) Other practitioners (for example, nurse practitioners and physicians' assistants, naturopaths, and chiropractors);

(4) Therapists (for example, physical, occupational, or speech and language therapists); and

(5) Educational agencies and personnel (for example, school teachers, school psychologists who are not acceptable medical sources under paragraph (a), school counselors, preschools, early intervention teams, developmental centers, and daycare centers).

(f) *Evidence we need to establish statutory blindness.* If you are applying for benefits on the basis of statutory blindness, we will require an examination by a physician skilled in diseases of the eye or by an optometrist, whichever you may select.

[45 FR 55621, Aug. 20, 1980, as amended at 56 FR 5553, Feb. 11, 1991; 56 FR 36964, Aug. 1, 1991; 58 FR 47577, Sept. 9, 1993]

§ 416.927 Evaluating medical opinions about your impairment(s) or disability.

(a) *General.* (1) You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. See § 416.905. Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. See § 416.908.

(2) Evidence that you submit or that we obtain may contain medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(b) *How we consider medical opinions.* In deciding whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive.

(c) *Making disability determinations.* After we review all of the evidence relevant to your claim, including medical opinions, we make findings about what the evidence shows.

(1) If all of the evidence we receive, including all medical opinion(s), is consistent, and there is sufficient evidence for us to decide whether you are disabled, we

will make our determination or decision based on that evidence.

(2) If any of the evidence in your case record, including any medical opinion(s), is inconsistent with other evidence or is internally inconsistent, we will weigh all of the evidence and see whether we can decide whether you are disabled based on the evidence we have.

(3) If the evidence is consistent but we do not have sufficient evidence to decide whether you are disabled, or, if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we will try to obtain additional evidence under the provisions of §§ 416.912 and 416.919 through 416.919h. We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information. We will consider any additional evidence we receive together with the evidence we already have.

(4) When there are inconsistencies in the evidence that cannot be resolved, or when despite efforts to obtain additional evidence the evidence is not complete, we will make a determination or decision based on the evidence we have.

(d) *How we weigh medical opinions.* Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) *Examining relationship.* Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) *Treatment relationship.* Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed below, as well as the factors in paragraphs (d)(3) through (5) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

(i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we

will give the source's opinion more weight than we would give it if it were from a nontreating source.

(ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(3) *Supportability.* The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.

(4) *Consistency.* Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

(5) *Specialization.* We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.

(6) *Other factors.* When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion.

(e) *Medical source opinions on issues reserved to the Secretary.*

(1) Opinions that you are disabled. We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) Other opinions on issues reserved to the Secretary. We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from treating and examining sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in Appendix 1 to subpart P of part

404 of this chapter, your residual functional capacity (see §§ 416.945 and 416.946), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Secretary. We will not give any special significance to the source of the opinion on these issues.

(f) *Opinions of nonexamining medical and psychological consultants and other nonexamining physicians and psychologists.* We consider all evidence from nonexamining physicians and psychologists to be opinion evidence. When we consider the opinions of nonexamining sources on the nature and severity of your impairments, we apply the rules set forth in paragraphs (a) through (e) of this section. In addition, the following rules apply to State agency medical and psychological consultants, and to medical advisors we consult in connection with administrative law judge hearings and Appeals Council review.

(1) At the initial and reconsideration steps in the administrative review process, except in disability hearings, State agency medical and psychological consultants are members of the teams that make the determinations of disability. A State agency medical or psychological consultant will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or equals the requirements for any impairment listed in Appendix 1 to subpart P of part 404 of this chapter, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case record but are not themselves evidence at these steps.

(2) Administrative law judges are responsible for reviewing the evidence and making findings of fact and conclusions of law. Administrative law judges are not bound by any findings made by State agency medical or psychological consultants. However, these findings are considered at the hearing level. See § 416.912(b)(6). When administrative law judges consider these findings, they will evaluate them using the rules set forth in paragraphs (a) through (e) of this section. Also, administrative law judges may ask for and consider the opinions of medical advisors on the nature and severity of your impairment(s) and whether your impairment(s) equals the requirements of any listed impairment in appendix 1 to subpart P of part 404 of this chapter.

(3) When the Appeals Council makes a decision, it will follow the same rules for considering opinion evidence as administrative law judges follow.

[56 FR 36968, Aug. 1, 1991]

§ 416.928 Symptoms, signs, and laboratory findings.

Medical findings consist of symptoms, signs, and laboratory findings:

(a) *Symptoms* are your own description of your physical or mental impairment. If you are a child under age 18 and are unable to adequately describe your symptom(s), we will accept as a statement of this symptom(s) the description given by the person who is most familiar with you, such as a parent, other relative, or guardian. Your statements (or those of another person) alone, however, are not enough to establish that there is a physical or mental impairment.

(b) *Signs* are anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicate specific abnormalities of behavior, affect, thought, memory, orientation and contact with reality. They must also be shown by observable facts that can be medically described and evaluated.

(c) *Laboratory findings* are anatomical, physiological, or psychological phenomena which can be shown by the use of a medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays), and psychological tests.

[45 FR 55621, Aug. 20, 1980, as amended at 58 FR 47586, Sept. 9, 1993]

ROBERT ISHIKAWA
ATTORNEY AT LAW
2300 TULARE, SUITE 350
FRESNO, CALIFORNIA 93721

(209) 445-0630

August 1, 1990

John C. Aleman, M.D.
Medical Director
727 W. Childs Ave.
P.O. Box 858
Merced, CA 95341

RE: Chiad Saelee
SSN: 566-91-7485
DOB: 06-14-50

Dear Dr. Aleman:

I represent Ms. Chiad Saelee in her claim for Supplemental Security Income Disability benefits. enclosed [sic] please find an authorization for the release of her medical records.

She has requested a hearing and a hearing will be held in the near future. At that hearing the following issues will be litigated:

1. Whether Ms. Saelee has a severe impairment which would limit her ability to engage in any type of work.

2. Whether her impairments will last or have lasted more than 12 months.

3. Whether Ms. Saelee can perform sedentary work as defined by the Social Security Administration. I have enclosed the definition of this term for your review.

Please substantiate your opinion with any clinical or laboratory evidence available to you. As a treating physician the Social Security Adimnistration [sic] places great weight on your opinion and therefore your opinion will be very helpful to Ms. Saelee's case.

Very truly yours,
ROBERT ISHIKAWA
RI/dk
Encl.

[LOGO]

MERCED FAMILY HEALTH CENTERS, INC.

Administration • 727 West Childs Ave,
P.O. Box 858 Merced, CA 95341
(209) 383-1848

Childs Avenue Clinic
Merced
383-7441

Planada Family
Health Center
Planada
382-0253

Family Health Center
Nueva Esperanza
Los Banos
826-1045

West Modesto
Medical Clinic
Modesto
576-2845

Patterson Medical Clinic
Patterson
892-8441

Dos Palos Health Center
Dos Palos
392-????

WIC Program
Merced and Mariposa
Counties
383-7454

August 9, 1990

Mr. Robert Ishikawa
Attorney at Law
2300 Tulare, Suite 350
Fresno, California 93721

RE: Chiadorn Saelee
DATE OF BIRTH: 06-14-50
SS# 566-91-7485
pfn# 1-26123

Dear Mr. Ishikawa:

I received your request for a medical opinion regarding Ms. Saelee's claim for supplemental Social Security Disability Income benefits. It can be readily seen from her medical records that Ms. Saelee has multiple medical problems, many of which are caused by or related to a post-traumatic stress syndrome, depression, or anxiety.

In addition, she has anatomical disorders including a left-sided cataract, a bilateral hearing loss requiring the use of a hearing aid, and chronic sinusitis. She also experiences chronic left leg pain of uncertain etiology, which appears to result in a limp and somewhat unsteady gait. She also experiences chronic dizziness of uncertain etiology.

She is scheduled for further evaluation of her complaints of hearing loss, vertigo, and sinusitis by Robert Culberson, M.D., and ENT physician, on 8-13-90. I have not been able to demonstrate any clear neurological or anatomical lesions to explain her chronic left leg pain. The patient also has chronic lower back pain, which is felt to be secondary to degenerative joint disease of the spine.

Her current medications consist of a medication for chronic essential hypertension, Tylenol for pain, and a medication for dizziness. I do not believe that any of

these problems individually would prevent the patient from pursuing a sedentary job, however, her history of lower back pain, leg pain, dizziness, hearing loss, visual difficulties, depression, and anxiety taken as a whole make it very unlikely that she can realistically perform any sedentary job at this time.

The prognosis for improvement is very poor.

Sincerely,

/s/ John C. Aleman, M.D.
John C. Aleman, M.D.
Diplomate of American
Academy of Family
Practice

JCA:dm

Exhibit 43Pg2

"Your Community Health Center."